APPENDIX

SUPREME COURT of the UNITED STATES

October Term, 1970

~~No. 1349~~
70-112

JAMES E. GROPPI, PETITIONER,

vs.

JACK LESLIE,
SHERIFF OF DANE COUNTY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petition for Certiorari Filed April 6, 1971
Certiorari Granted June 7, 1971

INDEX

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:

D. C. Form No. 106A Rev.

No. 69-C-241 (M) (H-C)

TITLE OF CASE	ATTORNEYS
JAMES E. GROPPI, Petitioner, -vs-	For plaintiff: *William M. Coffey and James M. Shellow, ~~Shellow, Shellow & Coffey,~~ 660 E. Mason St., (152 W. Wis. Ave.) 53203 Milwaukee, Wis. 53202 (Robert Friebert) and Pdrcy L. Julian, Jr., 330 E. Wilson St., Madison, Wis. 53701. *William M. Coffey, 152 West Wisconsin Ave., Milwaukee 53203 James M. Shellow, 660 E. Mason St., Milwauke

Respondent.

James Boll, D. A. of Dane County
City-County Building
Madison, Wisconsin 53709
Robert W. Warren,
Attorney General,
State Capitol,
Madison, Wis. 53702

FILED
APR 8 1970

30

Petition for writ of habeas corpus.

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.		DISB.	
S. 5 mailed	Clerk			10/7/69	Shellow rate	5	00		
				10/10/69	C D # 15			5	00
S. 6 mailed	Marshal			5/15/70	State of Wis (appeal)	5	00		
				5/15/70	00445			5	00
asis of Action:	Docket fee								
leged illegal and unconsti-tional detention and incar-ration of petitionr.	Witness fees								
ction arose at:	Depositions								
Madison, Wisconsin.									

DATE	PROCEEDINGS	Date Order Judgment No.
10/7/69	Filed petitioner's Petition for Writ of Habeas Corpus	(1)
10/8/69	Filed order requiring respondent to file response to writ within 3 days of service of this order. U.S. Marshal's return thereon	(2)
10/8/69	Filed order to show cause returnable 10/10/69 at 11:00 a.m. U.S. Marshal's return thereon	(3)
10/8/69	Filed return of service of petition for writ of habeas corpus with the U.S. Marshal's return thereon. Attached it to petition	(4)
10/9/69	Filed order changing the time for hearing scheduled for 10/10/69 at 11:00 a.m. to 10/10/69 at 3:00 p.m.	(5)
10/10/69	Filed order to show cause returnable October 10, 1969, at 3:00, with service acknowledged thereon	(6)
10/10/69	Filed respondent's memorandum of authorities. (Delivered to Judge Doyle.)	(7)
10/10/69	Called for hearing on return of orders to show cause. Appearances: Shellow, Shellow & Coffey, by James M. Shellow, Gilda M. Shellow and Robert H. Friebert; and Percy L. Julian, Jr., attorneys for plaintiff. Robert W. Warren, Atty. Gen; David Hanson, Betty Brown and Sverre O. Tinglum, Asst. Attys. Gen., attorneys for	

	respondent. Offer of evidence on behalf of petitioner: Pet. Exhs. A.B. and C offered. Respondent's motion for stay denied. Respondent's motion for dismissal is denied without prejudice to his right to renew motion at some future time. Petitioner's motion for admission to bail to be announced on 10/11/69. Adjourned.	
10/11/69	Filed response	(8)
10/11/69	Filed notice by the Court as to when the ruling on petitioner's application for bail will be entered	(9)
10/11/69	Filed opinion and order of the Court and attached Ex. A. By direction of the Court, certified copy of this document served on respondent in person by the U.S. Marshal. Return of service made and filed	(10)
10/11/69	Filed appearance bond	(11)
10/13/69	Filed order setting a briefing schedule	(12)
10/20/69	Filed order requesting comment on statements contained in opinion of the Supreme Court of Wisconsin entered on 10/17/69. Copies mailed.	(13)
11/1/69	Filed clerk's copy of pet's. brief in support of pet. for writ of habeas corpus	(13½)
11/4/69	Filed petitioner's motion to modify travel restrictions. Served on Atty. Gen. Warren by the U.S. Marshal. Return on back of motion	(14)

11/4/69	Filed order granting petitioner's motion to modify travel restrictions. Copy served on Atty. Gen. Warren. U.S. Marshal's return on back of motion. Copy mailed to Mr. Julian	(15)
11/26/69	Filed motion by plaintiff to modify travel restrictions with David S. Hansen , Asst. Atty. Gen's no objection on back	(16)
11/26/69	Filed order granting plaintiff's motion for modification. Copies mailed.	(17)
12/5/69	Cases called for consolidated hearing. (69-C-235 and 69-C-241). Appearances: Percy L. Julian, James M. Shellow, Gilda B. Shellow, William M. Coffey, and Robert H. Friebert, attorneys for plaintiff petitioner. Sverre O. Tinglum and David Hanson, Asst. Atty. Gens., attorneys for defts. respondents. Arguments. Taken under advisement.	
1/5/70	Filed petitioner's motion to modify travel restrictions with accompanying affidavit.	(18)
1/5/70	Filed copy of petitioner's motion to modify travel restrictions with accompanying affidavit with counsel for respondent's consent to the modification.	(19)
1/6/70	Filed order granting motion of petitioner for modification of travel restrictions. Copy mailed to counsel.	(20)
1/8/70	Filed petitioner's motion to modify travel restrictions.	(21)

1/9/70	Filed order modifying petitioner's travel restrictions. Copy mailed.	(22)
1/20/70	Filed copy of motion for re-hearing supporting brief before Wis. Supreme Court and denial	(23)
1/23/70	Filed petitioner's motion to modify travel restrictions.	(24)
1/23/70	Filed order granting petitioner's motion to modify travel restriction.	(25)
2/20/70	Filed motion to modify travel restrictions of petitioner.	(26)
2/20/70	Filed order granting petitioner's motion to modify travel restrictions. Copy mailed.	(27)
4/8/70	Filed opinion and order granting petition for writ of habeas corpus, denying respondents' motion to dismiss, vacating order of 10/11/69 and releasing petitioner from any further custody or restraint pursuant to the resolution adopted by the Assembly of the State of Wisconsin on 10/1/69.	(28)
5/6/70	Filed respondent's notice of appeal. Copies mailed to William M. Coffey.	(29)
6/12/70	Certified Record on Appeal forwarded to the Hon. Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, by first-class certified mail. Copies of covering letter and record pages mailed to counsel.	

PETITION FOR WRIT OF HABEAS CORPUS

(Caption Omitted)

The petitioner, JAMES E. GROPPI, by his attorneys, WILLIAM M. COFFEY, JAMES M. SHELLOW, and PERCY L. JULIAN, JR., respectfully shows to the court and alleges as follows:

1. The jurisdiction of this Court is invoked under 28 U.S.C. § 2241 *et. seq.* to release the petitioner from the custody of the respondent which custody is in violation of the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution.

2. That the petitioner is a citizen of the State of Wisconsin and of the United States.

3. That the petitioner is imprisoned and restrained of his liberty in the Dane County Jail by the respondent, JACK LESLIE, Sheriff of Dane County, Dane County, Wisconsin.

4. That the petitioner is not committed or detained by virtue of a final judgment or order of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such a judgment or order.

5. That the cause of the imprisonment and detention of the petitioner in the Dane County Jail is an arrest upon an order and judgment of the Assembly of the State of Wisconsin pursuant to the provisions of § 13.26 and 13.27, Wis. Stats.

6. That the petitioner, by a separate action, *Father James E. Groppi* v. *Harold Froelich*, No. 69-C-235, in the United States District Court for the Western District of Wisconsin, has caused the court to request the convening of a three-judge federal court to consider the constitutionality of the statutes by which the petitioner is detained by the respondent.

7. That the petitioner has exhausted his state remedies as follows:

a. On October 6, 1969, at 1:30 p.m., attorneys for the petitioner presented to the Clerk of the Circuit Court for Dane County a Writ of Habeas Corpus and were assigned to the Honorable W. L. Jackman, Circuit Judge of Dane County, Wisconsin.

b. That at 1:45 p.m., on October 6, 1969, Judge Jackman was informed of the existence of said Writ and at 2:30 p.m. he signed an order granting the issuance of habeas corpus. The attorneys for the petitioner urged that an immediate hearing be held on the Writ, or in the alternative, if Judge Jackman could not hear it immediately, assign it to an available Circuit Judge. Judge Jackman refused to permit the transfer of the cause and made the Writ returnable before him at 8:30 a.m. on October 7, 1969. He stated that he would not hear the matter on the afternoon of October 6, 1969, on the grounds that he was engaged in a trial and his calendar would not permit an earlier hearing. Earlier in the day and in a related matter brought by the Attorney General (*State of Wisconsin ex rel. Robert Warren* v. *James E. Groppi*) the attorneys for petitioner were advised that if that matter were not concluded prior to the commencement of Judge Jackman's 1:30 p.m. trial, the Attorney General's action would be continued in evening sessions on October 6, 1969.

c. That at 8:30 a.m., October 7, 1969, the respondent, the Sheriff of Dane County, filed his return to the Writ of Habeas Corpus which asserted that the petitioner was held pursuant to the authority of the Assembly Resolution of October 1, 1969; the attorneys for petitioner demurred to the return and placed in issue the constitutionality of the procedures by which the petitioner is detained.

d. Argument was had on the Writ and the matter was taken under advisement by Judge Jackman. In response to inquiries by the attorneys for petitioner as to when the matter would be decided, the Judge stated he could not advise regarding the decision time. This statement by the court is attached hereto and made a part hereof as though fully set forth herein.

e. Upon his refusal to advise counsel of a decision time, attorneys for petitioner moved that the petitioner be released on bail pending a determination of the issues.

f. At approximately 9:30 a.m., the attorneys for petitioner appeared before the Honorable E. Harold Hallows, Chief Justice of the Wisconsin Supreme Court and presented to the Chief Justice and three members of the court an Order to Show Cause why they should not be allowed to commence an original action in habeas corpus in the Wisconsin Supreme Court.

g. In the course of the conversation, the Chief Justice indicated that he had talked to Judge Jackman by telephone and had been informed that Judge Jackman would not rule on the petition for habeas corpus until at least 12:00 noon on October 8, 1969, at the earliest. The Chief Justice then stated that he would not, on behalf of the court, sign the Order to Show Cause before Judge Jackman's decision. The Chief Justice did state, however, that the Supreme Court would entertain an Emergency Application for Bail at 11:30 a.m. on October 7, 1969. The Chief Justice further indicated that at that time the attorneys for the petitioner could again take up with the court the matter of the Order to Show Cause.

h. At approximately 10:45 a.m., the unsigned Order to Show Cause and accompanying petition were served on Robert Warren, Attorney General of the State of Wisconsin, and subsequently an Emergency Application for Bail was served on

his office. Copies of said Order to Show Cause and Emergency Application for Bail are attached hereto and made a part hereof as though fully set forth herein.

i. At approximately 11:15 a.m., the attorneys for petitioner were informed by Franklin Clarke, Clerk of the Wisconsin Supreme Court, that the hearing on the Emergency Application for Bail and Order to Show Cause had been continued to 2:00 p.m., October 7, 1969.

j. The petitioner and attorneys for petitioner had requested action by the Wisconsin Supreme Court because the proceedings before Judge Jackman did not afford the petitioner with "prompt access to a state court with adequate power to act on the merits of his claim and . . . a determination of his claim with extraordinary promptness."

k. At or about 2:00 p.m. on October 7, 1969, after argument, the Supreme Court declined to issue the Order to Show Cause on the grounds that the matter was pending before Judge Jackman. Further, the court declined to enlarge the petitioner on bail but without prejudice to renew the application for bail if and when the court decided to exercise its discretionary jurisdiction to issue the Order to Show Cause.

l. In all of the above petitions, the attorneys for the petitioner, on behalf of the petitioner, alleged that petitioner's confinement without bail violated rights guaranteed to him by the United States Constitution and the Wisconsin State Constitution, including the Eighth and Fourteenth Amendments to the United States Constitution.

8. That your petitioner has reason to believe and does believe that there was no process issued by any Court upon a showing of probable cause.

9. That your petitioner has reason to believe and does believe that the imprisonment of the petitioner is in violation of the Constitution and laws of the State of Wisconsin and the Constitution of the United States in the following respects:

a. Petitioner has been and is being held without bail.

b. With respect to the alleged violations of §§13.26 and 13.27, Wis. Stats., the petitioner has been denied the right to be represented by counsel, the right to a trial or hearing of any kind, the right to compulsory process for the attendance of witnesses, the right to be informed of the nature and cause of the accusation against him, the right to confront his accusers and the right to present his defense to the alleged charges.

c. Petitioner has not been restrained of his liberty as a result of any violation of any rules of the Assembly of the State of Wisconsin, but rather has been restrained of his liberty for an alleged violation of a statute of the State of Wisconsin which purports to make his conduct punishable by criminal or criminal-type sanctions; therefore, the procedure employed constitutes a bill of attainder and/or pains and punishments.

d. The resolution of the Assembly of the State of Wisconsin pursuant to which the petitioner is restrained of his liberty directs that the petitioner be so restrained for six months or for the duration of the 1969 Regular Session, whichever is briefer. The resolution further directs that a copy of the same be transmitted to the District Attorney of Dane County for his further action pursuant to the purported authority of §13.27(2), Wis. Stats. Said section subjects the petitioner to further restraint of his liberty upon proof of the legislative contempt resolution, thereby twice denying him an

opportunity to defend himself against the alleged charges and to confront the witnesses against him. It further places the petitioner twice in jeopardy for the same alleged offense.

e. That upon information and belief, the attorneys for the petitioner have reason to believe and do believe that the acts of the Assembly of the State of Wisconsin in passing the resolution and in restraining the petitioner's liberty were illegal in that said Assembly was not legally or validly in either regular or special session on September 29, 1969, the date of the alleged disorderly conduct offense, or October 1, 1969, the date on which the resolution was passed.

10. A copy of the resolution passed by the Assembly of the State of Wisconsin pursuant to which the petitioner is restrained of his liberty is attached hereto and made a part hereof.

11. That the remedies available to the petitioner in the courts of the State of Wisconsin are ineffective to protect the rights of the petitioner in that they have not permitted the petitioner prompt access to a state court with adequate power to act on the merits of his claim *and* a determination of his claim with the extraordinary promptness required by this court in *Father James E. Groppi* v. *Harold Froelich,* No. 69-C-235, dated October 6, 1969. Further, said remedies are ineffective to protect the rights of the petitioner and petitioner has exhausted his state remedies because said remedies have failed in fact to provide petitioner with the relief required by the Constitution of the United States *and* with a determination of his claim with extraordinary promptness.

12. That the courts of the State of Wisconsin cannot afford petitioner a review of the facts surrounding and underlying his being held in contempt. The remedy provided by the state

courts is, therefore, inadequate to protect the rights of the petitioner.

WHEREFORE, the attorneys for the petitioner pray that a Writ of Habeas Corpus issue out of and under the seal of this Court, commanding that the respondent or his deputies or assistants who presently hold the body of the petitioner in their custody bring him forthwith before this Court and then and there show the cause of his detention, and that pending the determination of this Writ of Habeas Corpus and the constitutional issues raised in *James E. Groppi* v. *Harold Froelich* (No. 69-C-235, United States District Court for the Western District of Wisconsin) and any related actions pending in Wisconsin state courts, the petitioner be enlarged on such bail as to this court seems reasonable and just, and for such other and further relief as to this court appears equitable and just.

Respectfully submitted,

/s/ William M. Coffey
WILLIAM M. COFFEY

/s/ James M. Shellow
JAMES M. SHELLOW

/s/ Percy L. Julian, Jr.
PERCY L. JULIAN, JR.

(Verification Omitted)

EXHIBIT ATTACHED TO PETITION

STATE OF WISCONSIN DANE COUNTY
CIRCUIT COURT

STATE OF WISCONSIN, ex rel.
JAMES E. GROPPI,
Petitioner,

v. **128426**

JACK LESLIE, Sheriff of Dane County,
Respondent.

WRIT OF HABEAS CORPUS

IN THE NAME OF THE STATE OF WISCONSIN: To JACK LESLIE, Sheriff of Dane County, Wisconsin, or his deputies or assistants who now has or have in his or their custody the person of JAMES E. GROPPI by whatever name said person is known:

YOU ARE HEREBY COMMANDED to have the body of the relator, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, before the Honorable *W. L. Jackman*, Judge of the Circuit Court at *8:30 a.m.* on the *7th* day of October, 1969, in his courtroom at the City-County Building, to do and receive what shall then and there be considered concerning said relator.

AND HAVE YOU THEN AND THERE THIS WRIT.

Witness my hand and seal this *7th* day of October, 1969.

/s/
Clerk

EXHIBIT ATTACHED TO PETITION

STATE OF WISCONSIN DANE COUNTY
CIRCUIT COURT

STATE OF WISCONSIN ex rel.
JAMES E. GROPPI,
Petitioner,

v. Case No. **128426**

JACK LESLIE, Sheriff of
Dane County,
Respondent.

ORDER GRANTING WRIT OF HABEAS CORPUS

On reading and filing the verified petition of WILLIAM M. COFFEY, from which it appears that JAMES E. GROPPI is illegally imprisoned and restrained of his liberty by one JACK LESLIE, Sheriff of Dane County, Wisconsin, and the undersigned being satisfied therefrom that a Writ of Habeas Corpus should issue:

IT IS ORDERED that a Writ of Habeas Corpus issue out of and under the seal of the Circuit Court of Dane County, Wisconsin, directed to the said JACK LESLIE, commanding him to produce the body of said JAMES E. GROPPI before me in my courtroom at the City-County Building at Madison, Wisconsin, at *8:30* o'clock in the *fore*noon on the *7th* day of October, 1969, to do and receive what shall then and there be considered concerning the said JAMES E. GROPPI, and to certify and return therewith the time and cause of his imprisonment or restraint.

Dated this *7th* day of October, 1969, at Madison, Wisconsin.

BY THE COURT:

/s/ W. L. Jackman
CIRCUIT COURT

EXHIBIT ATTACHED TO PETITION

STATE OF WISCONSIN DANE COUNTY
CIRCUIT COURT

STATE OF WISCONSIN ex rel.
JAMES E. GROPPI,
Relator,

v. 128426

JACK LESLIE, Sheriff of
Dane County,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable , Judge of the Circuit Court of Dane County, Wisconsin:

The petition of WILLIAM M. COFFEY respectfully represents and shows to the Court as follows:

1. That your petitioner is an attorney at law, is licensed to practice in the State of Wisconsin, and is one of the attorneys representing the relator.

2. That the relator is imprisoned and restrained of his liberty in the Dane County Jail by the respondent, JACK LESLIE, Sheriff of Dane County, Wisconsin.

3. That the relator is not committed or detained by virtue of a final judgment or order of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such a judgment or order.

4. That your petitioner has reason to believe and does believe that the cause of the imprisonment and detention of the

relator is an arrest upon an order and resolution of the Assembly of the State of Wisconsin pursuant to the purported authority of the provisions of §§ 13.26 and 13.27 Wis. Stats.

5. That your petitioner has reason to believe and does believe that there was no process issued by any Court upon a showing of probable cause.

6. That your petitioner has reason to believe and does believe that the imprisonment of the relator is in violation of the Constitution and laws of the State of Wisconsin and the Constitution of the United States in the following respects:

a. Relator has been and is being held without bail.

b. With respect to the alleged violations of §§ 13.26 and 13.27 Wis. Stats., the relator has been denied the right to be represented by counsel, the right to a trial or hearing of any kind, the right to compulsory process for the attendance of witnesses, the right to be informed of the nature and cause of the accusation against him, the right to confront his accusers and the right to present his defense to the alleged charges.

c. Relator has not been restrained of his liberty as a result of any violation of any rules of the Assembly of the State of Wisconsin, but rather has been restrained of his liberty for an alleged violation of a statute of the State of Wisconsin which purports to make his conduct punishable by criminal or criminal-type sanctions; therefore, the procedure employed constitutes a bill of attainder and/or pains and punishments.

d. The resolution of the Assembly of the State of Wisconsin pursuant to which the relator is restrained of his liberty directs that the relator be so restrained for six months or for the duration of the 1969 Regular Session, whichever is briefer. The resolution further directs that a copy of the same be transmitted to the District Attorney of Dane County for his

further action pursuant to the purported authority of § 13.27 (2) Wis. Stat. Said section subjects the relator to further restraint of his liberty upon proof of the legislative contempt resolution thereby twice denying him an opportunity to defend himself against the alleged charges and to confront the witnesses against him. It further places the relator twice in jeopardy for the same alleged offense.

e. That upon information and belief, your petitioner has reason to believe and does believe that the acts of the Assembly of the State of Wisconsin in passing the resolution and in restraining the relator's liberty were illegal in that said Assembly was not legally or validly in either regular or special session on September 29, 1969, the day of the alleged disorderly conduct, or October 1, 1969, the date on which the resolution was passed.

7. A copy of the resolution passed by the Assembly of the State of Wisconsin pursuant to which the relator is restrained of his liberty is attached hereto and made a part hereof.

8. That this petition is made pursuant to the provisions of Chapter 292 Wis. Stats., and is in support of the Writ of Habeas Corpus to which it is annexed.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus issue out of and under the seal of this Court, commanding that the respondent or his deputies or assistants who presently hold the body of the relator in their custody bring him forthwith before this Court and then and there show the cause of his detention.

/s/ William M. Coffey
WILLIAM M. COFFEY

(Verification Omitted)

1969 Spec. Sess. ASSEMBLY RESOLUTION

Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county jail.

In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26 (1) (b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27 (2) of the Wisconsin Statutes; and, be it further

Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom.

(End)

EXHIBIT ATTACHED TO PETITION

STATE OF WISCONSIN DANE COUNTY
CIRCUIT COURT

STATE OF WISCONSIN ex rel.
JAMES E. GROPPI,
Petitioner,

v.

JACK LESLIE, Sheriff of
Dane County,
Respondent.

No. 128426

RETURN TO WRIT OF
HABEAS CORPUS

STATE OF WISCONSIN)
)
COUNTY OF DANE)

Vernon G. Leslie, sheriff of Dane county, Wisconsin, being first duly sworn, for return to the within writ of habeas corpus, on oath states as follows:

1. That he has the above named relator in his custody and under his power.

2. That the authority and true cause of such imprisonment is that on October 1, 1969 the Wisconsin Assembly passed a Resolution in which it found the relator, James E. Groppi, guilty of contempt of the Assembly committed on September 30, 1969, in the immediate view of the house and directly tending to interrupt its proceedings during a meeting of the 1969 regular session of the Wisconsin legislature, ordered the imprisonment of the said relator for a period of 6 months or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail, and directed the respondent as sheriff of Dane county to seize the relator and deliver him to the jailer of the Dane county jail.

3. That a true copy of the certified copy of the said Resolution is annexed to this return and made a part hereof.

4. In obedience to the command of said writ, respondent has the body of the said relator present before the court at the time and place specified in the said writ.

/s/ Vernon G. Leslie

Subscribed and sworn to before me
this 7th day of October, A.D. 1969.

/s/_____

I, Wilmer H. Struebing, Assembly Chief Clerk, do hereby certify that the attached Assembly Resolution Special Session 6 was passed by the Assembly on the *1st* day of *October*, 1969.

/s/ Wilmer H. Struebing
WILMER H. STRUEBING

1969 Spec. Sess. ASSEMBLY RESOLUTION 6

September 30, 1969 - Introduced by COMMITTEE ON RULES, by request of Assemblymen Sensenbrenner, Olson, Klicka, Nitschke, McDougal, Parkin, Schwefel, Lynn and Bock.

Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county jail.

In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26 (1) (b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27 (2) of the Wisconsin Statutes; and, be it further

Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom.

(End)

EXHIBIT ATTACHED TO PETITION

STATE OF WISCONSIN Ex Rel JAMES E. GROPPI

v.

JACK LESLIE, SHERIFF OF DANE COUNTY

Case No. 128-426

THE COURT: All right; well, I'm not going to decide this from the bench--it's too involved. I'm just not going to do it. I'm going to take the time to look at these authorities that have been cited to me and to read them because this is, you might say, a rather obscure issue and one that there isn't a great deal of authority on. It's unusual; and I'll get out something on this just as soon as I possibly can.

MR. COFFEY: Your Honor, I move that this Court release Father Groppi from his confinement on bail pending determination of this Court on the writ of habeas corpus presently pending before it.

THE COURT: No. Your motion is denied.

MR. SHELLOW: Your Honor, when will this Court rule on this matter?

THE COURT: Just as soon as I can. You brought this in at 2:30 yesterday afternoon.

MR. SHELLOW: That's correct.

THE COURT: And you asked me to set it as promptly as possible. I have done so and this is a matter of some concern to Father Groppi and it's a matter of some concern to the State. Now, you went to the federal court, the federal court took the weekend and came up with the result that he should pass the ball to me, which I'm perfectly willing to accept and I'm willing to work on this right away. You have an injunction proceeding which I'm working on also, which was heard yesterday morning, and I'm trying to conclude that as promptly as possible. This will take precedence.

MR. SHELLOW: Your Honor, may we have some indication from the Court? Our client is locked up in prison.

THE COURT: I appreciate that and he has been for a week.

MR. SHELLOW: That's right, illegally, we contend. If he has a right to be free, he has a right to be free this minute.

THE COURT: That may well be but I haven't held in your favor yet. As soon as I do we will; but I'm not going to snap-judge this matter, which is what you're saying to me.

MR. SHELLOW: I ask only for a time when we can know.

THE COURT: I can't give you a time. Father Groppi will know as soon as it occurs.

MR. WARREN: Your Honor, might I raise the point that I'm not sure whether we're at all proper in arguing all these facts. I understood that the petitioners demur to the return and in my way of thinking that would admit the facts that are on our return; and yet we've been involved in all sorts of factual arguments where they talk about what legislators were there and whether or not they were in session; and yet I think they're bound by their pleadings in this case.

MR. SHELLOW: Our pleadings say the legislature was not in session and that is a matter that we will bring before the Court on a later occasion.

THE COURT: All right; court will be in recess.

(Which concluded the proceedings)

EXHIBIT ATTACHED TO PETITION

STATE OF WISCONSIN

IN SUPREME COURT

STATE OF WISCONSIN, ex rel. JAMES E. GROPPI,	)	
Petitioner,	)	
v.	)	
	)	Case No.
JACK LESLIE, Sheriff of Dane County,	)	
Respondent.	)	

ORDER TO SHOW CAUSE

On reading and filing the verified petition of WILLIAM M. COFFEY, JAMES M. SHELLOW, and PERCY L. JULIAN, for leave to commence an original action for a Writ of Habeas Corpus:

IT IS HEREBY ORDERED that JACK LESLIE, Sheriff of Dane County, Wisconsin, show cause before this Court at its Courtroom in the State Capitol Building, Madison, Wisconsin, on the day of October, 1969, at o'clock in the noon, or as soon thereafter as Counsel may be heard, why this Court should not grant leave to the petitioner to commence an original action for a Writ of Habeas Corpus as prayed for in said petition.

Let a copy of this Order to Show Cause, together with a copy of the Petition, be served on the Honorable ROBERT WARREN, Attorney General of the State of Wisconsin and on

JACK LESLIE, Sheriff of Dane County, Wisconsin, not later than o'clock in the noon on the day of October, 1969.

Dated at Madison, Dane County, Wisconsin, this day of October, 1969.

JUSTICE

EXHIBIT ATTACHED TO PETITION

STATE OF WISCONSIN

IN SUPREME COURT

STATE OF WISCONSIN, ex rel. JAMES E. GROPPI,	)	
Petitioner,	)	
v.	)	Case No.
JACK LESLIE, Sheriff of Dane County,	)	
Respondent.	)	

PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE SUPREME COURT OF THE STATE OF WISCONSIN:

The petition of WILLIAM M. COFFEY, JAMES SHELLOW, and PERCY L. JULIAN, JR., respectfully shows to the Court and alleges as follows:

1. That the petitioners are attorneys duly licensed to practice in the State of Wisconsin and are three of the attorneys representing the above-named relator, JAMES E. GROPPI.

2. That the relator is imprisoned and restrained of his liberty in the Dane County Jail by the Respondent.

3. That the relator is not committed or detained by virtue of a final judgment or order of any competent tribunal of civil or criminal jurisdiction or by virture of an execution issued upon such a judgment or order.

4. That your petitioners have reason to believe and do believe that the cause of the imprisonment and detention of the relator is an arrest under an order and resolution of the Assembly of the State of Wisconsin pursuant to the purported authority of §§13.26 and 13.27, Wis. Stats.

5. That on the 6th day of October, 1969, petitioner obtained a Writ of Habeas Corpus from the Circuit Court of Dane County, Wisconsin; that a hearing was scheduled on said Writ for the *7th* day of October, 1969, at *8:00* o'clock in the *fore*noon before the Honorable *W. L. Jackman,* Circuit Judge, presiding, and that pending a hearing on this Writ, the relator was remanded to the custody of the respondent. The delay of the hearing on this Writ of Habeas Corpus denies to the relator "a determination of his claim with extraordinary promptness" as required by the opinion of the Honorable James E. Doyle, United States District Judge for the Western District of Wisconsin, in the case of *Father James E. Groppi* v. *Harold Froelich, et al.*, No. 69-C-235, dated October 6, 1969.

6. That your petitioners have reason to believe and do believe that there was no process issued by any Court upon a showing of probable cause.

7. That your petitioners have reason to believe and do believe that the imprisonment of the relator is in violation of the Constitution and laws of the State of Wisconsin and the Constitution of the United States in the following respects:

a. Relator has been and is being held without bail.

b. With respect to the alleged violations of §§13.26 and 13.27, Wis. Stats., the relator has been denied the right to be represented by counsel, the right to a trial or hearing of any kind, the right to compulsory process for the attendance of witnesses, the right to be informed of the nature and the cause of the accusation against him, the right to confront his accusers and the right to present his defense to the alleged charges.

c. Relator has not been restrained of his liberty as a result of any violation of any rules of the Assembly of the State of Wisconsin, but rather has been restrained of his liberty for an alleged violation of a statute of the State of Wisconsin which purports to make his conduct punishable by criminal or criminal-type sanctions; therefore, the procedures employed constitute a bill of attainder and/or pains and punishments.

d. The resolution of the Assembly of the State of Wisconsin pursuant to which the relator is restrained of his liberty directs that the relator be so restrained for six months or for the duration of the 1969 Regular Session, whichever is briefer. The resolution further directs that a copy of the same be transmitted to the District Attorney for Dane County for his further action pursuant to the purported authority of §13.27(2), Wis. Stats. Said section subjects the relator to further restraint of his liberty upon proof of the legislative contempt resolution thereby twice denying him an opportunity to defend himself against the alleged charges and to confront

the witnesses against him. It further places the relator twice in jeopardy for the same alleged offense.

e. That upon information and belief, your petitioners have reason to believe and do believe that the acts of the Assembly of the State of Wisconsin in passing the resolution and in restraining the relator's liberty were illegal in that said Assembly was not legally or validly in either regular or special session on September 29, 1969, the date of the alleged disorderly conduct, or October 1, 1969, the date on which the resolution was passed.

8. A copy of the resolution passed by the Assembly of the State of Wisconsin pursuant to which the relator is restrained of his liberty is attached hereto and made a part hereof.

9. That the relator can appeal to the Wisconsin Supreme Court from the order of the Honorable *W. L. Jackman,* Circuit Judge, whereby the relator was remanded to the custody of the respondent pursuant to the provisions of §§274.05 and 274.11, Wis. Stats., but the petitioners have reason to believe and do believe that such an appeal could not be decided by the Wisconsin Supreme Court before the first week in December, 1969, at the earliest, and that in the interim, the relator would remain in custody due to said improper arrest, detention and denial of bail and would thereby suffer irreparable harm; that an appeal to the Supreme Court of Wisconsin from the order of the Circuit Court of Dane County, Wisconsin, quashing the Writ of Habeas Corpus is not an adequate remedy.

WHEREFORE, your petitioners pray that this Court grant them leave to commence an Original Action for a Writ of Habeas Corpus against the respondent in the Supreme Court of Wisconsin.

Dated at Madison, Dane County, Wisconsin, this *6th* day of October, 1969.

/s/ William M. Coffey
WILLIAM M. COFFEY

/s/ James Shellow
JAMES SHELLOW

/s/ Percy L. Julian, Jr.
PERCY L. JULIAN, JR.

(Verification Omitted)

EXHIBIT ATTACHED TO PETITION

STATE OF WISCONSIN

IN SUPREME COURT

STATE OF WISCONSIN, ex rel.
JAMES E. GROPPI,
Petitioner,

v.

JACK LESLIE, Sheriff of Dane County,
Respondent.

EMERGENCY APPLICATION FOR BAIL PENDING ACTION ON PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION FOR WRIT OF HABEAS CORPUS

The petition of WILLIAM M. COFFEY, JAMES SHELLOW, and PERCY L. JULIAN, JR., respectfully shows to the court and alleges as follows:

1. That the petitioners are attorneys duly licensed to practice in the State of Wisconsin and are three of the attorneys representing the above-named relator, JAMES E. GROPPI.

2. That the relator is imprisoned and restrained of his liberty in the Dane County Jail by the respondent.

3. That the Honorable W. L. Jackman, Circuit Judge of Circuit Court Branch II, Dane County, presently has the matter which is the subject of the action for a Writ of Habeas Corpus under advisement, and has refused relator's motion for bail pending said judge's determination.

4. That the petitioners hereby petition this court for an order granting to the relator bail pending the determination of the Circuit Court of Dane County and pending this court's determination with respect to the petition for leave to commence an original action for Writ of Habeas Corpus, and pending this court's action, if any, upon an appeal or action otherwise taken, from the decision of the Circuit Court of Dane County.

5. That the grounds for this motion are that by reason of the Eighth and Fourteenth Amendments to the United States Constitution the relator is entitled to bail pending a determination of the issues raised in both the Circuit Court of Dane County and in this court, as well as the issues raised under the United States Constitution in said courts and in the United States District Court for the Western District of Wisconsin.

Dated this 7th day of October, 1969.

Respectfully submitted,

WILLIAM M. COFFEY

JAMES SHELLOW

PERCY L. JULIAN, JR.

EXHIBIT ATTACHED TO PETITION

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

FATHER JAMES E. GROPPI,
Plaintiff

v.

HAROLD FROELICH, individually and as Speaker of the Wisconsin Assembly and as a representative of a class known as "Members of the Wisconsin Assembly";
JAMES BOLL, individually and as District Attorney of Dane County, Wisconsin;
VERNON T. LESLIE, individually and as Sheriff of Dane County, Wisconsin,
Defendants

OPINION AND ORDER

69-C-235

This is an action in which the plaintiff attacks the validity, under the Constitution of the United States, of § 13.26 and § 13.27 of the Wisconsin Statutes, and in which he also alleges that §§ 13.26 and 13.27, even if valid, are being invoked for the unlawful purpose of depriving him of certain rights secured to him by the Constitution of the United States. The plaintiff seeks a judgment declaring that §§ 13.26 and 13.27 violate the Constitution of the United States, an injunction restraining the defendants from enforcing or executing §§ 13.26 and 13.27, and an injunction restraining the defendants from refusing to release plaintiff forthwith from imprisonment.

The plaintiff has moved for a temporary restraining order by which the defendants would be restrained from further enforcement of §§ 13.26 and 13.27 against the plaintiff or, in

the alternative, a temporary order that the plaintiff be released from prison forthwith upon his own recognizance pending final disposition of this action.

This opinion and order is limited to the questions raised by the plaintiff's motion for a temporary restraining order.

From the allegations of the complaint, from certain documents offered by the defendants at the hearing on the motion for a temporary restraining order and received without objection on the part of the plaintiff, and from representations of counsel at the said hearing concerning which there is no disagreement, I make the following findings of fact, for the limited purpose of acting upon the motion for a temporary restraining order.

On October 1, 1969, the Assembly, which is one of the two houses of the Wisconsin state legislature, adopted a resolution citing the plaintiff herein for contempt of the Assembly. The resolution recited that the plaintiff herein had led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty. The resolution contained a finding by the Assembly that the said action by the plaintiff constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings". The resolution recited that the said conduct is an offense punishable as a contempt under § 13.26(1)(b), Wis. Stat., and Article IV, Section 8 of the Wisconsin Constitution. The resolution contained a finding that the plaintiff herein was guilty of contempt of the Assembly. By the resolution, the Assembly ordered, in accordance with §§ 13.26 and 13.27,

that the plaintiff be imprisoned for a period of six months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane County Jail. By the resolution the Assembly directed the Sheriff of Dane County to seize the plaintiff and to deliver him to the jailer of the Dane County Jail. Finally, by the resolution, the Assembly directed that a copy of the resolution be transmitted to the District Attorney of Dane County "for further action by him under Section 13.27(2) of the Wisconsin Statutes".

A copy of the said resolution was subsequently served upon the plaintiff. He is presently confined in the Dane County Jail upon the authority of the said resolution. No hearing has been held either in the Assembly or in any court at which the plaintiff herein has been afforded an opportunity to answer to the charge contained in the Assembly resolution.

Article IV, Section 8, Wisconsin Constitution, provides, in part:

> "Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior...."

Section 13.26, Wisconsin Statutes, provides, in part:

> "(1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members . . . for . . .
>
> ". . . .
>
> "(b) Disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings . . . .
>
> "(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature."

Section 13.27, Wisconsin Statutes, provides:

> "(1) Whenever either house of the legislature orders the imprisonment of any person for contempt under s. 13.26 such person shall be committed to the Dane county jail, and the jailer shall receive such person and detain him in close confinement for the term specified in the order of imprisonment, unless he is sooner discharged by the order of such house or by due course of law.
>
> "(2) Any person who is adjudged guilty of any contempt of the legislature or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefor in Dane county, and may be fined not more than $200 or imprisoned not more than one year in the county jail."

In this opinion I will consider, first, the plaintiff's motion for temporary relief from his present confinement, and then the plaintiff's motion for temporary relief with respect to a threatened second period of confinement under § 13.27(2).

Present Confinement

The plaintiff's motion now under consideration seeks: (1) a temporary order restraining the defendants from further enforcement of §§ 13.26 and 13.27, Wis. Stat., against the plaintiff; or, in the alternative, (2) a temporary order that the plaintiff be released on bail from his present imprisonment.

Although neither the complaint nor the plaintiff's motion for a temporary restraining order is so phrased, the relief sought is clearly the relief for which a petition for habeas corpus is appropriate. "Whatever its other functions, the great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention." *Walker v. Wainwright*, 390 U.S. 335, 336 (1968).

Jurisdiction has been conferred upon the United States district courts to grant habeas corpus to a prisoner "in

custody in violation of the Constitution . . . of the United States . . . ." *28 U.S.C.* § 2241(c)(3). However, 28 U.S.C. § 2254 provides that "a person in custody pursuant to the judgment of a State court shall not be granted" federal habeas corpus unless he has previously exhausted the remedies available in the state courts, or unless there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective. The reviser's note to this statute, enacted in 1948, is that it was declaratory of existing law. 28 U.S.C.A. § 2254, p. 476. See *Ex parte Hawk*, 321 U.S. 114 (1944). The complaint herein does not recite that the plaintiff has exhausted remedies available in the state courts, nor does it recite that there is an absence of state corrective process, nor does it recite the existence of circumstances rendering such process ineffective.

It has been held that when the remedy actually sought is habeas corpus, the requirement of prior exhaustion of state remedies may not be avoided by stating the claim in the language of the Civil Rights Act, 42 U.S.C. § 1983. *Gaito v. Strauss*, 368 F. 2d 787, 788 (3d Cir. 1966), cert. den., 386 U.S. 977; *Johnson v. Walker*, 317 F. 2d 418 (5th Cir. 1963); *Martin v. Roach*, 280 F. Supp. 480 (S.D.N.Y. 1968); *May v. Peyton*, 268 F. Supp. 928 (W.D. Va. 1967); *Davis v. State of Maryland*, 248 F. Supp. 951 (D. Md. 1965); *Threatt v. State of North Carolina*, 221 F. Supp. 858 (W.D.N.C. 1963). 42 U.S.C. § 1983 must be construed in the light of 28 U.S.C. § 2254. Therefore, even if the complaint herein is treated as a petition for habeas corpus, it appears that it may fail for want of a showing that state remedies have been exhausted.

For the reasons stated, plaintiff's motion for a temporary restraining order with respect to release from his present confinement is hereby denied.

By the ruling just stated, I do not intend to prevent the plaintiff from filing a petition for habeas corpus in this court with respect to his present confinement.

I note that the exact language of 28 U.S.C. § 2254 is that federal habeas corpus shall not be granted to "a person in custody pursuant to the judgment of a State court" unless certain conditions, stated above, have been met. It appears that this plaintiff is not in custody pursuant to the judgment of any court. There has been no opportunity as yet to determine whether § 2254 should be construed to apply to a person in custody pursuant to a resolution of a house of a state legislature, nor to determine the legal consequences if § 2254 is not so construed.

Moreover, even under § 2254 one is eligible for federal habeas corpus, when confined in violation of the Constitution of the United States, if it can be shown that there is an absence of available state corrective process or that circumstances exist rendering such process ineffective. This case presents an extraordinary situation in which the plaintiff has been confined without the benefit of any of those protections normally considered essential to due process of law. Whether the defendants are prevented by the Constitution of the United States from confining the plaintiff in such an extraordinary manner is the basic issue yet to be determined. In this situation, I would consider that such state corrective process as may be available would be ineffective unless it permitted plaintiff prompt access to a state court with adequate power to act on the merits of his claim, and unless it provided a determination of his claim with extraordinary promptness.

The Threatened "Second" Confinement

A portion of the Assembly resolution directs that a copy of it be transmitted to the Dane County district attorney "for further action by him under Section 13.27 (2)." Section 13.27

contempt of the legislature or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefore in Dane county, and may be fined not more than $200 or imprisoned not more than one year in the county jail."

Thus it appears that the plaintiff is threatened with a second term of confinement following his present term of confinement, and that the second term of confinement may be invoked in a court proceeding in which it may be necessary for the district attorney only to show that the Assembly did in fact adopt the resolution embodying the contempt citation.

The threat is direct and real. Thus it appears that the defendants, acting under color of state law, are theatening in this way to deprive plaintiff of his freedom. Under 42 U.S.C. § 1983, he is entitled to relief if it can be shown that this threatened deprivation violates the Constitution of the United States. I conclude that it is not an insubstantial or frivolous contention that the guarantee of due process of law embodied in the Fourteenth Amendment would be violated by a procedure in which proof of the adoption of the contempt citation by the Assembly, without more, would trigger a second period of confinement.

Jurisdiction of this claim by the plaintiff is present. 28 U.S.C. § 1343(3). Since injunctive relief against the operation of state statutes, §§ 13.26 and 13.27, is sought, the convening of a three-judge federal court is required. 28 U.S.C. § 2281. Today I am requesting the Chief Judge of the Seventh Circuit to convene such a three-judge court.

With respect to the threatened second confinement, it appears that no temporary restraining order, pending the convening of the three-judge court is necessary. A three-judge court can be expected to be convened and actually to hold an appropriate hearing before the commencement of the threatened second confinement.

Therefore, with respect to the threatened second confinement, the plaintiff's motion for a temporary restraining order is hereby denied.

With respect to the threatened second confinement, unlike the plaintiff's present confinement, 42 U.S.C. § 1983 appears to afford the plaintiff a remedy, in a proper case, without any requirement that he first exhaust state remedies, *Damico v. California*, 389 U.S. 416 (1967). This distinction between the availability of relief from present confinement and the availability of relief from the threat of future confinement, with respect to the requirement of exhaustion of state remedies, may be anomalous, or it may not, but it is a distinction which appears to exist in the present state of the law.

Entered this *6th* day of October, 1969.

By the Court:

/s/ James E. Doyle
District Judge

EXHIBIT ATTACHED TO PETITION

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

FRANKLIN W. CLARKE
CLERK

Shellow, Shellow & Coffey
To Attorneys at Law
660 East Mason Street
Milwaukee, Wisconsin 53202

Madison, October 7, 1969

Mr. Robert W. Warren
Attorney General

Mr. Percy L. Julian, Jr.
Attorney at Law
330 East Wilson Street
Madison, Wisconsin 53703

Sir: The Court today announced decision in your case as follows:

STATE OF WISCONSIN, ex rel. JAMES E. GROPPI v. JACK LESLIE, Sheriff of Dane County.

The application for bail is denied without prejudice subject to renewal if this court should grant the petition for leave to commence an original action for writ of habeas corpus.

Respectfully yours,

FRANKLIN W. CLARKE
Clerk of Supreme Court

ORDER
(Caption Omitted)

Petitioner, presently confined in the Dane County Jail, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 et seq. The petition alleges that petitioner is being held in custody in violation of his rights under the Constitution of the United States.

I conclude that a response to the petition is required.

Title 28 U.S.C. § 2243 states that the response ". . . shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed".

Now, Therefore, It Is Ordered: that the respondent file a response not later than three days after service upon him of the petition herein.

Entered this *8th* day of October, 1969.

By the Court:
/s/ *James E. Doyle*
District Judge

ORDER TO SHOW CAUSE

(Caption Omitted)

Upon the verified petition, and exhibits thereto, filed herein by the petitioner James E. Groppi, praying for issuance of a writ of habeas corpus, and praying for release on his own recognizance or on bail pending disposition of his petition for habeas corpus and pending a determination of certain issues raised in *Groppi v. Froelich et al,* W.D. Wis., 69-C-235, and in any related actions pending in Wisconsin state courts,

It is hereby ordered that the respondent Jack Leslie show cause before this Court on October 10, 1969, at 11:00 a.m., why, upon his execution of his own recognizance or upon his depositing bail conditioned upon his appearance in this Court from time to time as may be ordered by this Court, petitioner should not be released from all detention and restraint by the respondent Jack Leslie, pursuant to the resolution adopted by the Assembly of the State of Wisconsin on October 1, 1969, pending disposition of the petition for habeas corpus before this Court or other order of this Court.

Entered this *8th* day of October, 1969.

By the Court:

/s/ James E. Doyle
District Judge

ORDER

(Caption Omitted)

The hearing scheduled herein for 11:00 a.m., Friday, October 10, 1969, is hereby postponed until 3:00 p.m., Friday, October 10, 1969.

Entered this *9th* day of October, 1969:

By the Court:

/s/ James E. Doyle
District Judge

MOTION TO DISMISS OR IN THE ALTERNATIVE TO STAY PROCEEDINGS

(Caption Omitted)

Respondent moves the court as follows:

1. To dismiss the above entitled action because the petition fails to state a claim upon which relief can be granted, or in the alternative

2. To stay the proceedings including the return in the above entitled action pending exhaustion of state remedies as required pursuant to 28 USCA §2254 (b).

Dated October 9, 1969.

/s/ *Robert W. Warren*
ROBERT W. WARREN
Attorney General

Attorney for Respondent

AFFIDAVIT

(Caption Omitted)

Robert W. Warren, first being duly sworn, on oath deposes and says:

1. That he is one of the attorneys for the respondent in the above entitled action.

2. That the attached copy of a *per curiam* order of the Supreme Court of the State of Wisconsin dated October 9, 1969, and labeled "Exhibit A", is hereby exhibited to the court as part of this Affidavit in support of respondent's Motion to Dismiss or in the Alternative to Stay Proceedings and that he believes the same to be a true and correct copy of the original.

/s/ *Robert W. Warren*
ROBERT W. WARREN
Attorney General

Subscribed and sworn to before
me this *9th* day of October,
1969.

/s/ Roy G. Mita
Notary Public, Wisconsin
My Commission *permanent*

EXHIBIT A TO AFFIDAVIT

August Term, 1969

STATE OF WISCONSIN — IN SUPREME COURT

State of Wisconsin ex rel.
JAMES E. GROPPI, — Petitioner,

vs.

JACK LESLIE, Sheriff of Dane County, — Respondent.

PER CURIAM. The petitioner James E. Groppi on October 7, 1969, filed a petition for leave to commence an original action in *habeas corpus*. The court waives oral argument and accepts original jurisdiction of the action for the writ of *habeas corpus* and in the interest of saving time and of expediting this cause, the court will consider the petition now on file as the complaint, granting leave to the petitioner to amend his petition as he may desire by 3:00 o'clock p.m. today, October 9th, 1969. Any amendment shall be served upon the Attorney General for the state of Wisconsin, who has represented the respondent in this matter before this court and has been served with the petition. The respondent shall answer the complaint by 9:00 o'clock a.m., tomorrow, October 10, 1969, and serve said answer upon the attorneys for the petitioner.

A hearing on the complaint and answer shall be held at 10:00 o'clock a.m., tomorrow, October 10, 1969, in the Supreme Court court room. The motion for bail is presently under reconsideration by this court upon the renewal motion of the petitioner for bail pursuant to this court's order of October 7, 1969.

ORDER TO SHOW CAUSE

(Caption Omitted)

A Motion to Dismiss or in the Alternative to Stay Proceedings along with a supporting Affidavit having been filed with the court and the court being of the view that the motion should be heard promptly, and being advised in the premises

IT IS HEREWITH ORDERED that the petitioners show cause, if they have any, before this court at *3:00* o'clock in the *after*noon on *Friday*, the *10th* day of October, 1969, or as soon thereafter as counsel can be heard, why the attached motion to dismiss or in the alternative to stay proceedings should not be granted.

Let a copy of this order be served on the defendants no later than *10:30 A.M. October 10, 1969.* Dated this *10th* day of October, 1969, at 9:25 A.M.

BY THE COURT,

/s/ James E. Doyle
JAMES E. DOYLE
District Judge

RESPONSE

(Caption Omitted)

Respondent, by Robert W. Warren, Attorney General of Wisconsin, and David J. Hanson, Betty R. Brown and Sverre

O. Tinglum, Assistant Attorneys General, his attorneys, as and for a response to the petition herein admits, denies and alleges as follows:

1. In response to paragraph three, four and five thereof, ADMITS that respondent holds petitioner in custody and that the true cause of the detention is a resolution of the Assembly of the State of Wisconsin dated October 1, 1969, a certified copy of which is attached hereto as Exhibit A.

2. In response to paragraph seven thereof, DENIES that petitioner has exhausted his remedies in the courts of the State of Wisconsin; ALLEGES that petitioner made no good faith effort to obtain relief in the circuit court for Dane county, Wisconsin, but made a perfunctory presentation in that court, which rendered judgment on the merits within 48 hours after the filing of a petition for a writ of habeas corpus there, quashing the writ and dismissing the petition; further ALLEGES that upon petitioner's own motion, the Wisconsin Supreme Court granted leave to petitioner to commence an original action in habeas corpus in that court, and that pursuant to that court's order, issue was joined on October 10, 1969 and oral argument was had at 11:00 a.m. on October 10, 1969, the cause being now under advisement by that court.

3. In response to paragraph nine thereof, DENIES, that petitioner is being detained in violation of any right guaranteed him under the Constitution or laws of the United States; ADMITS that petitioner is held without bail; ALLEGES that petitioner was committed to jail for contempt as set forth in Exhibit A, and that petitioner had no right under the Constitution or laws of the United States to a trial prior to commitment; DENIES that petitioner is detained pursuant to any bill of pains and punishments; DENIES that petitioner has been or will be subjected to double jeopardy within the meaning of the Constitution of the United States; ALLEGES that the Assembly

was validly in session on both September 29, 1969 and October 1, 1969, and that any failure on the part of the Assembly to convene on September 29, 1969 was the immediate result of the unlawful conduct then engaged in by petitioner and others.

4. In response to paragraph eleven thereof, DENIES that the remedies available to petitioner in the Wisconsin courts are ineffective and DENIES that petitioner has exhausted the remedies available in the Wisconsin courts; ALLEGES that the courts of the State of Wisconsin have acted with extraordinary promptness in the consideration of petitioner's claims, and that petitioner has not been hindered or delayed in pursuing said remedies in any fashion; further ALLEGES that petitioner has made no good faith attempt to allow the courts of the State of Wisconsin to consider the merits of his claims in any orderly or deliberate manner.

5. In response to paragraph twelve thereof, ALLEGES that petitioner has made no effort whatever to seek a review in the Wisconsin courts of the facts surrounding his being held in contempt; ALLEGES that petitioner raised no such factual issues in his pleadings in the state courts, and made no attempt to secure a hearing for the determination of such facts.

6. ALLEGES that the petition fails to state a claim upon which relief may be granted.

7. ALLEGES that said petition on its face shows that petitioner has failed to exhaust his remedies in the courts of Wisconsin.

/s/ Robert W. Warren
ROBERT W. WARREN
Attorney General of Wisconsin

DAVID J. HANSON
Assistant Attorney General

BETTY R. BROWN
Assistant Attorney General

SVERRE O. TINGLUM
Assistant Attorney General

Attorneys for Respondent

Post Office Address:

State Capitol
Madison, Wisconsin 53702

EXHIBIT A TO RESPONSE

I, Thomas T. Melvin, Assistant Chief Clerk, do hereby certify that the attached Assembly Resolution Special Session 6 was passed by the Assembly on the *1st* day of *October*, 1969.

/s/ Thomas T. Melvin
THOMAS T. MELVIN

EXHIBIT A

1969 Spec. Sess. ASSEMBLY RESOLUTION

6

Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county jail.

In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted "disorderly conduct in the immediate view of the house and directly

tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26 (1) (b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27 (2) of the Wisconsin Statutes; and, be it further

Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom.

(End)

MEMORANDUM AND DIRECTIVE

October 11, 1969
11:45 a.m.

Re: *Groppi v. Leslie*, 69-C-241

A ruling on petitioner's application for bail will be entered not later than 4:30 p.m., Monday, October 13, 1969. When a ruling is entered, the clerk will inform counsel by

telephone, and the clerk will also inform any representatives of the news media who request to be telephoned.

/s/ James E. Doyle,
District Judge

ORDER
(Caption Omitted)

Petitioner has filed a petition for habeas corpus. Based upon the allegations of his petition for habeas corpus, including the exhibits thereto, petitioner has also prayed that he be released upon his own recognizance or bail pending a determination in this habeas corpus proceeding, and in a related action in this court (*Groppi v. Froelich et al,* 39-C-235), and in related actions in the Wisconsin state courts. An order to show cause was entered herein October 8, 1969, with respect to the bail question, and a hearing has been held on the question.

This court possesses power to release a habeas corpus petitioner on bail pending a determination of the merits of his petition. *Wright v. Henkel,* 190 U.S. 40, 63 (1903); *Barth v. Clise,* 79 U.S. (12 Wall.) 400, 403 (1872); *In re Kaine,* 55 U.S. (14 How.) 103, 134 (1852); *United States ex rel. Epton v. Nenna,* 281 F. Supp. 388 (S.D.N.Y. 1968); *Application of Stecker,* 271 F. Supp. 406, 407-408 (D.N.J. 1966), aff'd 381 F.2d 379 (3d Cir. 1967); *United States ex rel. Mancini v. Rundle,* 219 F. Supp. 549, 552 (E.D. Pa. 1963), aff'd 337 F.2d 268 (3d Cir. 1964); *United States ex rel. Ackerman v. Commonwealth of Pennsylvania,* 133 F. Supp. 627, 630 (S.D. Pa. 1955), aff'd sub nom. *Johnston v. Marsh,* 271 F.2d 528 (3d Cir. 1955); *Artukovic v. Boyle,* 107 F. Supp. 11, 15 (S.D. Calif. 1952), rev'd on other grounds, 211 F.2d 565 (9th Cir. 1954), cert. denied 348 U.S. 818 (1954); *Principe v. Ault,* 62 F. Supp. 279, 284 (N.D. Ohio 1945). See *In re*

Shuttlesworth, 369 U.S. 35 (1962); *Smith v. Davis*, 5th Cir., No. 24649 (April 12, 1967); *Dresner v. Stoutamire*, 5th Cir., No. 21802 (August 5, 1964); *York v. Nichols*, 159 F.2d 147 (1st Cir. 1947). See also *Levy v. Parker*, 38 L.W. 2147 (order entered August 14, 1969, by Mr. Justice Douglas, Associate Justice, United States Supreme Court). See also Rule 49 of the Rules of the Supreme Court of the United States.

The provision of 28 U.S.C. Sec. 2254, that state remedies be exhausted, requires exhaustion before an application for federal habeas corpus is "'granted"; it does not deprive the federal district court of jurisdiction, pending the exhaustion of state remedies. *Thomas v. Teets*, 205 F.2d 236, 240 (9th Cir. 1953), cert. den. 346 U.S. 910. Thus, even if it is assumed that Sec. 2254 is applicable to the facts alleged in this petition, the court has jurisdiction to act, short of granting the application for habeas corpus.

I have said that jurisdiction is present, and that power to grant bail, pending a determination of the merits of the petition for habeas corpus, is also present. The question is whether this jurisdiction and this power should be exercised at this particular stage of this particular proceeding.

Upon the basis of the allegations of the petition and return filed herein, and by judicial notice, I find that a petition for habeas corpus, filed by this petitioner in the Circuit Court for Dane County, Wisconsin, alleging the same basic claim for relief, has been dismissed; that on October 9, 1969, the Supreme Court of Wisconsin accepted original jurisdiction of a petition for habeas corpus by this petitioner, alleging the same basic claim for relief; that a hearing on said petition was held in the Supreme Court of Wisconsin October 10, 1969; that the merits of said petition have not yet been acted upon by the Supreme Court of Wisconsin; and that the Supreme Court of Wisconsin has denied the petitioner's application for bail pending a determination on the merits.

An initial question is whether I should refrain from acting upon petitioner's application for bail in this court until the Supreme Court of Wisconsin has acted upon the merits of his petition for habeas corpus.

In *Townsend v. Sain*, 372 U.S. 293, 318 (1963), the Supreme Court of the United States decided:

> "Although the (federal) district judge may, where the state court has reliably found the relevant facts, defer to the state court's finding of fact, he may not defer to its findings of law. It is the (federal) district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas."

See *Brown v. Allen*, 344 U.S. 443, 506 (opinion of Mr. Justice Frankfurter) (1953); *United States ex rel. Worlow v. Pate*, 411 F.2d 972, 974 (7th Cir. 1969). Should the Supreme Court of Wisconsin grant habeas corpus to the petitioner on the merits, the proceeding here will become moot. On the other hand, should the Supreme Court of Wisconsin deny habeas corpus to the petitioner on the merits, although I would consider carefully its reasoning as well as the reasoning of Judge Jackman, I will be bound to apply the applicable federal law to the facts independently.

The underlying issue in this proceeding is whether the Constitution of the United States forbids the imprisonment of the petitioner by the Assembly in the manner in which he has been imprisoned. The merits of this issue have not yet been reached. However, it is already clear that the issue is of major importance and that it is an issue of considerable difficulty. Even so, in the more usual habeas corpus proceeding in this court, involving a petitioner confined in a state correctional institution pursuant to the judgment of a state court, it would be extraordinary to grant bail pending a determination of the merits of the petition. This is because, in the more usual habeas corpus proceeding, the petitioner has already

had the opportunity in a state court to defend against the charge; he has been convicted either upon a plea of guilty or upon a verdict of guilty; and he has had the opportunity to have his case reviewed by an appellate court. Under these more usual circumstances, although the petitioner may ultimately prevail in the habeas corpus proceeding, it is hardly sensible to release him from prison, on bail, merely on the strength of the allegations in his petition.

In the present case, on the other hand, the petitioner has been afforded no hearing of any kind, either in the Assembly which cited him for contempt and caused him to be confined, or in any court, on the truth or falsity of the charge against him or on the validity of any defense which he may desire to raise against the charge.

I understand the contention of the respondent that, in terms of constitutional power, the legislature is free to imprison the petitioner in just this manner, and I imply no opinion on that issue. But in terms of reasonableness of admitting a petitioner to bail pending a decision on the merits of his petition, I consider that there is a sharp difference between the case of a petitioner who has been imprisoned without any hearing whatever and the case of a petitioner who has had the benefit of the full panoply of procedural due process available in the usual criminal prosecution in the courts.

One further question deserves comment. The Assembly has sentenced petitioner to be imprisoned "for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer". The question is whether by the very act of admitting the petitioner to bail, the court would inevitably and irrevocably thwart the Assembly's intended punishment. This is a possibility. Thus, if the petitioner were admitted to bail, and if the 1969 regular session were to end the next day, it would probably be beyond the power of the court to order the petitioner's return to jail even if his petition for habeas corpus

were determined to have no merit. However, the probability is strongly otherwise. The 1967 regular session of the legislature ended January 6, 1969. The 1965 regular session ended either January 2, 1967, or January 11, 1967. The 1963 regular session ended January 13, 1965. Thus, it appears that an interval in which the petitioner is enlarged on bail will probably not prevent his serving a complete term of six months in jail, should his petition for habeas corpus be determined against him.

For the reasons stated herein, and upon the basis of the entire record, it is ordered that the respondent produce the petitioner herein before the clerk of this court, within *4* hours from the entry of this order, to permit the petitioner to execute an appearance bond in the form of the bond attached hereto as Appendix A, and made a part hereof; and

It is hereby further ordered, that upon the execution of said bond by the petitioner, the respondent shall forthwith release the petitioner from any further custody or restraint pursuant to the resolution adopted by the Assembly of the State of Wisconsin on October 1, 1969, until further order of this court.

Entered this *11th* day of October, 1969, at *4:00* o'clock in the *after*noon.

By the Court:

/s/ James E. Doyle
District Judge

APPEARANCE BOND

(Caption Omitted)

The undersigned acknowledges that he and his personal representative are bound to pay to the United States of America the sum of Five Hundred dollars ($500.00).

The conditions of this bond are that the petitioner is to appear in the United States District Court for the Western District of Wisconsin, in accordance with any and all orders and directions relating to the petitioner's appearance in the above entitled matter as may be given or issued by the United States District Court for the Western District of Wisconsin; that the petitioner is not to depart the State of Wisconsin; that the petitioner is not to enter the area bounded by the north curbline and extended curbline of Doty Street, the west curbline and extended curbline of Webster Street, the south curbline and extended curbline of Dayton Street, and the east curbline and extended curbline of Fairchild Street, all in the City of Madison, Wisconsin; that the petitioner is to abide any order or judgment which may be entered in this proceeding by surrendering himself to serve any sentence imposed by the Assembly of the State of Wisconsin and by obeying any order or direction in connection with such sentence as this court may prescribe.

If the petitioner appears as ordered and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the petitioner fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach and if the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States District Court against petitioner for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the laws of the United States; also, upon such forfeiture, a bench warrant for the arrest of the petitioner may be issued forthwith and he may be returned to the custody of the respondent.

It is agreed and understood that this is a continuing bond which shall continue in full force and effect until such time as the undersigned is duly exonerated of the condition of the bond.

This bond is signed on this ... day of October, 1969, at Madison, Wisconsin.

Name of Petitioner: ..... Address: .....

Signed and acknowledged before me this ... day of October, 1969.

.....

Clerk, United States District Court,
Western District of Wisconsin

ORDER

(Caption Omitted)

Petitioner's brief in support of the petition is to be served and filed by October 24, 1969; respondent's answering brief by November 7, 1969; and petitioner's reply brief, if petitioner elects to serve and file a reply brief, by November 14, 1969.

When the briefing has been completed, the court will advise whether a hearing is to be held and, if so, the nature of the hearing and the date of the hearing. In the briefs, counsel are invited to express their views concerning the necessity for an evidentiary hearing.

Entered this *13th* day of October, 1969.

By the Court:

/s/ James E. Doyle
District Judge

MOTION FOR RE-HEARING

(Formal Parts Omitted)

The Petitioner, by his Attorneys, SHELLOW, SHELLOW & COFFEY, and PERCY JULIAN, JR., hereby moves the Court for a re-hearing of its decision dated October 17, 1969.

Dated this 23rd day of October, 1969.

Respectfully submitted,

JAMES E. GROPPI, Petitioner

By PERCY JULIAN, JR., and
SHELLOW, SHELLOW
& COFFEY

ROBERT H. FRIEBERT

P. O. ADDRESS:

660 East Mason Street
Milwaukee, Wisconsin 53202

BRIEF IN SUPPORT OF MOTION FOR RE-HEARING

(Formal Parts Omitted)

The Petitioner wishes to raise three points on this motion for rehearing.

There were two separate issues raised with respect to the form of the Assembly Resolution. Only one of those questions was answered by the Court when the Court held that the Governor of the State of Wisconsin maintains the power to call a Special Session of the Assembly even though the Regular Session of the Assembly had not adjourned, *sine die*. The other question, which was not answered by the Court was whether a Special Assembly Resolution could condemn the action of the Petitioner and hold him in contempt of a regular session of the Assembly and further order him into confinement until adjournment of the Regular Session of the Assembly. Sec. 13.26 and Sec. 13.27, Wis. Stat. do not allow punishment of one Session of the Legislature by another Session of the Legislature. Sec. 13.26(2) states:

> "(2) The term of imprisonment a House may impose under this Section shall not extend beyond *the same session* of the Legislature." (Emphasis supplied).

Thus, the Special Session of the Legislature cannot punish for a contempt committed in the Regular Session of the Legislature and cannot make his confinement dependent upon the Regular Session of the Legislature. The Special Session of the Legislature can only conduct business which is related to the Special Session of the Legislature. Under these circumstances, it would take a meeting of the Regular Session of the Legislature to punish the Petitioner for

any contempt committed against the Regular Session of the Legislature. This issue was raised by the Petitioner and the Petitioner asks the Court at this time to determine the jurisdictional merits of this argument.

The Court seems to say that the Assembly did not have the power to punish someone for contempt but has contempt powers for the sole purpose of protecting itself so that it can meet. The Petitioner maintains that there is no difference between a punishment and protection because the Petitioner remains in confinement in either case in violation of due process of law. However, assuming the correctness of the distinction made by the Wisconsin Supreme Court, there has been absolutely no showing anywhere that the Petitioner would disrupt the Assembly Chambers. The only opportunity which any Court of this State has had to determine whether there was any real threat of disruption of the Assembly by the Petitioner occurred in the case of *State ex rel. Warren v. Groppi,* Case No. 128-400, Circuit Court, Dane County. In that case, an extensive hearing was held before Judge Jackman to determine whether a temporary injunction should remain in force against the Petitioner. The State was unable to sustain its burden of proof that there was any threat to the Assembly or any other branch of State Government. As a result, the temporary injunction was quashed due to this lack of proof. A copy of Judge Jackman's opinion dated October 17, 1969, is attached to this brief. We ask the Court to take judicial notice of this judicial determination and all of the underlying facts and circumstances which were brought out at the hearing in that matter. That decision and that hearing disclosed that there is no justification for the Assembly Resolution of the Special Session

of the Legislature to confine the Petitioner because there is no threat to them that their proceedings will be interrupted in the future by the Petitioner. Viewed in this respect, it is clear that, since there is no legitimate fear, that the Assembly Resolution must be viewed as punishment and is therefore punishment meeted out in violation of the Constitution.

At pages 12 and 13 of the Opinion, there is a suggestion that the Petitioner might have a right to some kind of a hearing on the merits of the contempt issue. We ask the Court to explain exactly what procedures might be available to the Petitioner to obtain a hearing since the Petitioner has been unable to find any Statutory authority to be tried on the merits of the contempt issue. In fact, the only authority found seems to preclude any hearing on the merits of a citation for contempt. In *State ex rel. Reynolds v. County Court,* 11 Wis. 2d 560, 573, the Court said:

> "The power to punish for contempt is a vital and important power of the Courts and the Writ of Habeas Corpus cannot be used in such a way as to interfer with the Court's power and authority to administer the law. * * * In addition to sec. 292.21, Stats., no judge or court shall inquire into the legality or justice of an order committing for contempt. Sec. 292.22 (2). * * * The inquiry of the writ, of such writ is proper on the face of the pleadings, is restricted to the question of the jurisdiction of the committing court. Errors in the exercise of jurisdiction are not reviewable by this collateral remedy."

Thus, there does not appear to be any procedure by which the Petitioner can gain a trial on the merits of the con-

tempt issue. If such a procedure exists, the Petitioner requests the Court to explain what procedure is available to the Petitioner for a hearing on the merits and what rights are available to the Petitioner in any such hearing. Furthermore, the Petitioner at this time requests an appropriate hearing on the merits of the contempt issue.

Respectfully submitted,

JAMES E. GROPPI, Petitioner

By PERCY JULIAN, JR., and
SHELLOW, SHELLOW
& COFFEY

ROBERT H. FRIEBERT

P. O. ADDRESS:

660 East Mason Street
Milwaukee, Wisconsin 53202

STATE OF WISCONSIN CIRCUIT COURT

DANE COUNTY

STATE OF WISCONSIN ex rel.
ROBERT W. WARREN, Attorney General,

Plaintiff,

v.

JAMES E. GROPPI, and All Other Persons Acting By, Through in Concert With, or In His Behalf,

Defendants.

Before: Hon. W. L. Jackman, Circuit Judge

Hearing on Temporary Injunction: October 6, 1969

Appearances:

Plaintiff by John C. Murphy,
Assistant Attorney General;

Defendant Groppi by William Coffey,
James Shellow, and Percy Julian, Jr.

No other appearances.

* * *

It is undisputed in this case that on September 29, 1969, the named defendant, James E. Groppi, hereafter referred to as "defendant" was the instigator and leader of a mob that invaded the State Capitol, occupied the Assembly Chamber, and prevented the transaction by the Assembly of any business whatever until about 4 P.M., at which time, with extreme difficulty, the Speaker called the Special Session scheduled for 2 P.M., to order and then adjourned it. Because of the invasion and occupancy, by

the mob, of the Assembly Chamber and the conduct of defendant, the orderly processes of the Assembly were prevented. Members of the Assembly were, in some cases, unable to occupy their seats and in other instances did so with difficulty only after 4 P.M. The Speaker was prevented from performing any of his duties in the Assembly Chamber until 4 P.M., when business had been scheduled for 1:30 P.M. and 2 P.M. The mob, under the leadership of defendant, destroyed property, damaged the equipment and furniture, and was extremely disorderly. The defendant had control of the activities of the mob and it acted under his direction and leadership. Orderly conduct of business by the Assembly was effectively prevented on that day.

The complaint and affidavit attached in this case in substance recite most of the facts above stated, the balance having been supplied by testimony. No persons were made defendants by name except the named defendant, probably because their identities are not known. No appearance was made in this action, either in person or by attorneys for any persons except defendant.

Paragraph 10 of the complaint alleges that, in view of the overt acts of defendant and others, plaintiff "is informed and verily believes" that there is immediate danger that the conduct complained of will continue and that further demonstrations will interfere with operation of state government.

Although plaintiff was given the opportunity to make a showing of fact, there is no evidence in the record that since his arrest plaintiff has done any act of which indicates that he or anyone following his leadership intends

to interfere with the processes of government or to interfere with state property in the future. While there may well have been disorders, to which the court is not blind, there is no showing that there is any present and immediate threat to future operation of state government or to its property from any conduct by defendant or anyone at his direction or under his leadership.

Injunctive relief is prospective, not retrospective. The past is important only with regard to what it forbodes of the future. Relief must be based upon the prospect of conduct that will be unlawful.

It was said in *Gaertner v. Fond du Lac*, 34 Wis. 497: "In the first place the allegations in regard to the threatened action * * * are stated on information and belief. These matters should have been positively stated in the complaint, or otherwise proven, under the rule on this subject laid down in *Dinehart v. The Town of LaFayette*, 19 Wis. 677." See also *Quinn v. Havernor*, 118 Wis. 53.

This is an application for a temporary injunction and its purpose is to preserve the status quo and not to determine the ultimate disposition of the case. Although the allegation of threatened misconduct was on information and belief (and we have no criticism of such an allegation because it is but an opinion of what the future holds), we allowed plaintiff the opportunity to produce proof, from which an inference might be drawn of a threat, in order that the court might have the facts. There is evidence that defendant has no regrets for what he has done, but no evidence of threats to interfere with state government or property in the future nor any evidence that at present he has the capacity to either lead or counsel disorders.

See *Fromm & Sichel, Inc. v. Ray's Brookfield*, 33 Wis. 2d 98.

We are of the opinion that the plaintiff has not made a prima facie case that there is any immediate threat from defendant. This does not mean that while this case is pending there may not be such a threat at a later time and plaintiff is not precluded, by other determination of this motion, from renewing it if a threat to orderly government does appear in which defendant has a part.

It is therefore ORDERED: That plaintiff's motion for a temporary injunction is denied, without prejudice to plaintiff's right to renew the same if the present circumstances are altered to show a threat to orderly processes of government or interference with the orderly use of state property in which defendant Groppi has counseled, participated in or encouraged. The order dated September 30, 1969, insofar as it enjoins defendant, is vacated.

Dated October 17, 1969.

BY THE COURT:

W. L. JACKMAN
Judge

Office of the Clerk

SUPREME COURT

State of Wisconsin

Madison, Dec. 19, 1969

To Shellow, Shellow & Coffey
Milwaukee

Sverre Tinglum, Asst. Atty. Gen.

Sir:—The Court today announced decision in your case as follows:

St. 122 State ex rel. James E. Groppi v. Jack Leslie, Sheriff of Dane County

Motion for rehearing denied without costs.

No opinion filed.

Respectfully yours,

FRANKLIN W. CLARKE
Clerk of Supreme Court

ORDER

(Caption Omitted)

In the briefs heretofore requested in this proceeding, counsel are requested to comment on the following statements contained in the opinion of the Supreme Court of Wisconsin entered October 17, 1969, in *Groppi v. Leslie*, State No. 122:

> "We do not hold the action of the legislature is not reviewable in our courts and subject to correction. It is expressly provided in sec. 13.27 the contemnor may be discharged before his time by 'the due course of law.' . . . We think due process is satisfied when the courts are open to determine promptly any question concerning the merits of a contempt found to have been committed by summary process before a legislature for contempt committed in its presence."

In particular, counsel are requested to comment on the nature of the judicial proceedings which may be available to one found by the legislature to have committed such a direct contempt, and the range of issues which he may raise in such judicial proceedings.

Entered this *20th* day of October, 1969.

By the Court:

/s/ James E. Doyle
District Judge

ENVELOPE CONTAINING PETITIONER'S EXHIBITS A, B AND C

(Caption Omitted)

ORIGINAL PETITIONER'S EXHIBITS A, B and C, offered and received in evidence upon hearing held in the above-entitled action at Madison, Wisconsin, on October 10, 1969.

/s/ John R. Adams
John R. Adams, Clerk.

PETITIONER'S EXHIBIT A

State No. 122

August Term, 1969

STATE OF WISCONSIN — IN SUPREME COURT

State of Wisconsin ex rel.
JAMES E. GROPPI, — Petitioner,

vs.

JACK LESLIE, Sheriff, Dane County, — Respondent.

The motion of the petitioner James E. Groppi for release from the custody of the repsondent Jack Leslie, Sheriff of Dane County, Wisconsin, pending the deliberation of the merits of this case is denied.

Dated at Madison, Wisconsin, this 10th day of October, 1969.

By the Court:

Franklin W. Clarke,
Clerk.

PETITIONER'S EXHIBIT B

August Term, 1969

STATE OF WISCONSIN — IN SUPREME COURT

State of Wisconsin ex rel.
JAMES E. GROPPI, — Petitioner,

vs.

JACK LESLIE, Sheriff of Dane County, — Respondent.

PER CURIAM. The petitioner James E. Groppi on October 7, 1969, filed a petition for leave to commence an original action

in *habeas corpus*. The court waives oral argument and accepts original jurisdiction of the action for the writ of *habeas corpus* and in the interest of saving time and of expediting this cause, the court will consider the petition now on file as the complaint, granting leave to the petitioner to amend his petition as he may desire by 3:00 o'clock p.m. today, October 9th, 1969. Any amendment shall be served upon the Attorney General for the state of Wisconsin, who has represented the respondent in this matter before this court and has been served with the petition. The respondent shall answer the complaint by 9:00 o'clock a.m., tomorrow, October 10, 1969, and serve said answer upon the attorneys for the petitioner.

A hearing on the complaint and answer shall be held at 10:00 o'clock a.m., tomorrow, October 10, 1969, in the Supreme Court court room. The motion for bail is presently under reconsideration by this court upon the renewal motion of the petitioner for bail pursuant to this court's order of October 7, 1969.

PETITIONER'S EXHIBIT C

STATE OF WISCONSIN

IN SUPREME COURT

STATE OF WISCONSIN, ex rel.
JAMES E. GROPPI,
Petitioner,

v.

JACK LESLIE, Sheriff of Dane
County,
Respondent.

RENEWED MOTION FOR BAIL AND FOR LEAVE TO COMMENCE AN ORIGINAL ACTION IN HABEAS CORPUS

Petitioner, FATHER JAMES E. GROPPI, by his attorneys, renews his earlier motions for leave to commence an original action for habeas corpus in the Supreme Court of Wisconsin and for admission to bail pending the final determination of this matter or such other matters in connection therewith as may be heard by the Wisconsin Supreme Court.

Petitioner requests an immediate submission of this motion to the court for decision and stands upon the authorities heretofore presented to the court in oral argument and the original petition and motion herein.

Respectfully submitted,

JAMES E. GROPPI, Petitioner

By */s/ Percy L. Julian, Jr.*
SHELLOW, SHELLOW and COFFEY
660 East Mason Street
Milwaukee, Wisconsin

PERCY L. JULIAN, JR.
330 East Wilson Street
Madison, Wisconsin
ATTORNEYS FOR PETITIONER

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1970 — SEPTEMBER SESSION, 1970

No. 18538
JAMES E. GROPPI,
Petitioner-Appellee,
vs.
JACK LESLIE, Sheriff of Dane County,
Respondent-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

January 6, 1971

Before SWYGERT, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* KILEY, CUMMINGS, KERNER, PELL and STEVENS, *Circuit Judges.*[1]

PELL, *Circuit Judge.* This matter being before the court *en banc* following reargument pursuant to the granting of Groppi's petition for rehearing, we are not persuaded that the result, and reasoning in support thereof, reached by the panel originally hearing this appeal, as set forth in the court's decision of October 28, 1970, is other than correct.

The basic and simple issue remains whether the judicial power of summary punishment[2] for direct contempt is constitutionally exercisable by the legislative branch. We hold that it is for the reasons advanced in the original

[1] Thomas E. Fairchild, Circuit Judge, has disqualified himself, noting that he was a member of the three-judge court which decided *Groppi v. Froehlich,* 311 F. Supp. 765 (W.D. Wis. 1970), a closely related case arising out of the same events as *Groppi v. Leslie,* 311 F. Supp. 772 (W.D. Wis. 1970), and heard at the same time.

[2] See *Ex parte Terry,* 128 U.S. 289 (1888).

opinion of this court, which opinion we now adopt and confirm. *Groppi* v. *Leslie*, ... F. 2d ..... (7th Cir. October 28, 1970).

While the resolution adopted by the Wisconsin Assembly might well have spelled out the alleged misconduct of Groppi with greater particularity, it nevertheless is couched in terms of ultimate fact which we do not find lacking in adequate specificity. There is no indication to us that the contemnor failed to be fully and explicitly informed of the charge leveled against him and the exact nature of his misconduct.

Our decision is reached on the narrow issue before us, involving direct interference with "conducting public business" in "the immediate view of the legislative body." We do not purport to reach any decision on the matter of contemptuous behavior occurring outside the legislative chamber itself.

Other means for punishing contempts are available to the legislature and resort to such other procedures may be found sufficiently efficacious in the future. We here hold, however, that the basic public need for inviolability of the legislative processes of our government dictates the availability of the power of summary contempt punishment to the legislative branch. The Wisconsin legislature has seen fit in the circumstances of the case before it to exercise that power and we do not deem it in the public interest to interfere.

It is to be noted that Groppi's term of imprisonment under the resolution does not extend beyond the end of the legislative term, i.e., January 7, 1971. Both petitioner's and respondent's counsel have argued that the issue here involved is not mooted by this fact. This is our opinion also. *See United States ex rel. Lawrence* v. *Woods*, 432 F. 2d 1073, 1074-75 (7th Cir. 1970).

REVERSED.

STEVENS, *Circuit Judge,* with whom SWYGERT, *Chief Judge,* and KILEY, *Circuit Judge,* join, dissenting.

At no time in this proceeding has petitioner asserted any claim of innocence, or any claim that his sentence was excessive. It may be assumed, as the Wisconsin Supreme Court plainly stated, that any such claim would have been promptly and fairly heard in some form of post conviction trial.[1] As the disposition of an isolated controversy, therefore, no one could criticize this court's judgment as unfair or unreasonable.

The case, however, must be decided in the context of our legal traditions. It raises only a procedural issue, but in my judgment that issue is of fundamental importance and requires that petitioner's conviction be set aside. *Cf. Rex* v. *Justices of Bodmin* [1947] 1 K.B. 321.

The Fourteenth Amendment to the United States Constitution limits the procedures which a state may employ prior to the imprisonment of any person. The applicable clause states: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law." One of the oldest and most consistently accepted maxims in our legal tradition is the proposition that "no man shall be punished before he has had an opportunity of being heard." *The King* v. *Benn and Church,* 6 T.R. 198 (1795) (Lord Kenyon, Ch.J.); see *United States* v. *Galante,* 298 F.2d 72, 77 (2d Cir. 1962) (Friendly, J., dissenting).

The procedure which Wisconsin employed to deprive the petitioner of his liberty violated that ancient maxim. On October 1, 1969, without any prior notice to petitioner, and without giving him or his counsel an opportunity to be present or to be heard, the Wisconsin Assembly cited him for contempt, found him guilty of an offense which had been committed two days earlier, and sentenced him to imprisonment.[2] Although I recognize that the due process

[1] See *State ex rel. Groppi* v. *Leslie,* 44 Wis. 2d 282, 297 (1969).

[2] That legislative finding not only deprived petitioner of his liberty; it also had a material impact on his procedural rights. Even assuming the availability of a post conviction remedy in which petitioner could have presented evidence or argument denying the rather vague charge in the resolution, the legislative finding eliminated his presumption of innocence and shifted the burden of proof. It would have been necessary for him to go forward with the task of proving a negative before he

clause tolerates flexible procedures in varying situations,[3] in my opinion the label "legislative contempt" does not exclude this *ex parte* conviction from the coverage of the Fourteenth Amendment.

Disorderly conduct on the floor of a legislative body is a well recognized species of legislative contempt.[4] Historically acts of violence,[5] like other legislative contempts such as attempted bribery,[6] refusal to answer questions or pro-

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[3] (Continued)
heard the evidence against him. As a practical matter the value of his privilege against self-incrimination and of his right to be confronted with the witnesses against him would have been debased, if not destroyed entirely.

[3] "Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess." *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 162-163 (Frankfurter, J. concurring).

[4] The Supreme Court decision which first upheld the power of Congress to punish contempts treated disorderly conduct in the presence of a legislative body as an established species of legislative contempt. *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 217, 228; see *Marshall* v. *Gordon*, 243 U.S. 521, 543-544; Shull, Legislative Contempt — An Auxiliary Power of Congress, 8 Temp. L.Q. 198, 202-203 (1934).

[5] In 1865, A. P. Field was reprimanded by the Speaker of the House and discharged from custody after a trial before a committee of the house at which he was found guilty of assaulting and wounding a member with a knife. Cong. Globe, 38th Cong., 2nd Sess. 991 (1865). In 1832, Sam Houston was arrested and tried before the House of Representatives for assaulting a member of the House, 8 Debates, 22nd Cong., 1st Sess. 2512-2620, 2810-3022. Perhaps the most famous instance of violence directed against a member of Congress occurred in 1856. Brooks, a member of the House of Representatives from South Carolina, who was offended by a speech, attacked Senator Charles Sumner in the Senate Chambers after adjournment, and beat him with a cane inflicting serious injuries. The Senate determined that the matter properly should be punished by the House, and a hearing was conducted by a Committee of the House which afforded Brooks the opportunity to appear and contest the evidence against him. H.R. Rep. No. 182, 34th Cong., 1st Sess. (1856).

[6] *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, apparently involved an attempt to bribe a member of the House. See 19 U.S. at 215; *Kilbourn* v. *Thompson*, 103 U.S. 168, 196. The contemnor was brought before the bar of the House and permitted to present a defense, 19 U.S. at 209-210. In 1795 Robert Randall was tried by the House on a charge of attempting to bribe a member and found guilty of contempt, 5 Annals, 4th Cong., 1st Sess. 166-195, 232, 200-229, 237, 243.

duce documents before a legislative committee,[7] and the destruction of subpoenaed documents,[8] have been prosecuted by the Legislature itself. In such cases the accused has been brought before the bar of the House and given an opportunity to speak in his own defense before any punishment was imposed. As this type of proceeding was no doubt somewhat cumbersome, and since the duration of any imprisonment was limited to the remainder of the legislative session, Congress long ago provided for the prosecution of contempts in judicial proceedings.[9] Apparently Congress never considered the possibility of avoiding the inconvenience of a prolonged legislative hearing by simply eliminating the accused's traditional opportunity to be heard in his own defense.[10]

Prior to October 1, 1969, no American legislature had found it necessary to employ *ex parte* procedures to punish disorderly or other contemptuous conduct. The fact that the exercise of summary contempt powers has been accepted as a necessary and appropriate aspect of our judicial processes does not support an argument that the Wisconsin Legislature needs or possesses like powers. Indeed, a comparison of the legislative and judicial experience with contempts leads to a contrary conclusion.

It is the business of judges to decide particular cases, to make determinations of guilt or innocence, to listen to arguments in mitigation, and to impose appropriate punishments. Although occasional abuses have required correction on review, by and large the judicial contempt power has proved useful in advancing the orderly disposition of

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[7] *McGrain* v. *Daugherty*, 273 U.S. 135 (refusal to appear; apparently Daugherty was discharged from custody by a Federal District Court in Ohio before he could be brought before the bar of the Senate, 273 U.S. at 154); *Kilbourn* v. *Thompson*, 103 U.S. 168 (refusal to answer a question and produce documents; Kilbourn was brought before the bar of the House and allowed to present a defense, 103 U.S. at 174).

[8] *Jurney* v. *MacCracken*, 294 U.S. 125 (destruction and removal of subpoenaed documents; MacCracken declined to appear before the bar of the Senate for trial, 294 U.S. at 143, 152).

[9] 2 U.S.C. § 192 makes the refusal to testify before a committee of Congress a misdemeanor. The original provision, 11 Stat. 155, was enacted in 1857. See *Jurney* v. *MacCracken*, 294 U.S. 125, 151; see also *In re Chapman*, 166 U.S. 661. In recent years Congress has relied upon the statutory procedure. See Goldfarb, The Contempt Power (1963), 43.

[10] Wisconsin's concern that a protracted hearing in this case might have required the legislative process to grind to a halt could, of course, have been eliminated by following the example of Congress.

litigation.[11] The conclusion that judges can safely be trusted with such powers is supported by analysis of the judicial function and by years of experience. The multitude of judicial contempt cases which have been decided in our history apparently include none in which a judge, two days after the offense, without giving the contemnor notice or any opportunity to be heard, entered an *ex parte* order sentencing him to prison.[12]

But that is the nature of the procedure employed by the Wisconsin Assembly in this case. This departure from tradition should itself point to the danger of entrusting summary contempt powers to bodies not accustomed to their exercise. The contempt power has been described as "perhaps nearest akin to despotic power of any power existing under our form of government." *State ex rel. Attorney General* v. *Circuit Court*, 97 Wis. 1, 8 (1897), and its exercise has been narrowly limited.[13] Without reflecting adversely on the importance and dignity of the legislative function, it must be recognized that legislators are more responsive to the temporary moods of the body politic

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[11] "I would go as far as any man in favor of the sharpest and most summary enforcement of order in Court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts." *Toledo Newspaper Co.* v. *United States*, 247 U.S. 402, 425-426 (Holmes, J. dissenting).

[12] The closest case I have found is *Ex parte Terry*, 128 U.S. 289, in which the contemnor, after being forcibly removed from the courtroom, was forthwith committed for contempt. In that case, however, the Court expressly reserved decision on the question whether a circuit court would have had the power on "a subsequent day" to proceed to order the arrest and imprisonment of the contemnor "without first causing him to be brought into its presence, or without making reasonable efforts by rule or attachment to bring him into court, and giving him an opportunity to be heard before being fined and imprisoned, . . ." 128 U.S. at 314. In cases in which contempts during the course of a trial are not punished until the end of the proceeding, the contemnor is, of course, continuously present in court and normally given repeated opportunities to be heard in defense or mitigation before the imposition of sentence.

[13] In *Anderson* v. *Dunn*, 19 (6 Wheat.) 204, 230, the Supreme Court stated that the legislative contempt power rests upon the principle of self-preservation and is limited to "the least possible power adequate to the end proposed." *Cf.*, *Kielley* v. *Carson*, 13 Eng.Rep. 225, 234-235 (P.C. 1842).

than are judges.[14] Therefore, history's recognition of a frequent need for summary punishment of judicial contempts does not establish a need for co-extensive legislative contempt powers.

It is argued that there was no risk of error or abuse in this case because petitioner's disorderly conduct occurred "in the immediate view of" the Wisconsin Assembly. It is contended that no purpose could have been served by hearing from petitioner or his counsel because the Assembly already knew all the facts. This may or may not be true. It is entirely possible that conduct which certain legislators found particularly offensive was committed by other members of the "gathering of people" led by petitioner;[15] it is possible that some legislators were particularly offended by insulting speech (perhaps even speech on other occasions)[16] rather than conduct; and that certain conduct was viewed by some legislators but not by others. Even if each member of the Assembly who voted in favor of the resolution had perfect knowledge of the facts, a valid purpose would have been served by hearing from petitioner before voting on the resolution. It is presumed that argument may persuade judges even when they know the facts.[17] I would give legislators the benefit of the same presumption.[18]

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[14] In the Seventeenth Century a judge who insulted the privileges of the House by questioning its contempt powers was himself subject to contempt proceedings, in which his political unpopularity apparently affected the members' deliberations. See colloquy between the Attorney General and Lord Ellenborough, C.J. in *Burdett* v. *Abbott*, 104 Eng. Rep. 501, 540-543 (1811).

[15] The opinion of the Wisconsin Supreme Court states that the Legislature could not perform its public duties without "imprisonment of the intruders," 44 Wis.2d at 291, yet the Assembly resolution related only to petitioner.

[16] Legislative attempts to punish disrespectful speech as contempts have occurred in the past but have not met with judicial approval. See *Marshall* v. *Gordon*, 243 U.S. 521, 545-546.

[17] In judicial proceedings in which there is no genuine dispute as to a material fact, and when only property rights are affected, the court may not enter a summary judgment without proper notice and argument. See Fed.R.Civ.P.56.

[18] When the Assembly voted on the resolution, presumably the need for emergency action had passed. At that time, since the Wisconsin courts disapprove of punishment by the Legislature for past misconduct, an argument questioning the propriety of a legislative sentence of six months would not have been frivolous. 44 Wis.2d at 296.

It is suggested that even if summary legislative contempt powers have been unnecessary historically, the modern day "politics of confrontation" have created a new necessity that requires abandonment of traditional procedures. I question the validity of the argument, even if limited in application to plenary sessions of state legislative bodies, for prompt police action is probably an adequate means of terminating disorder and enabling the legislative body to resume its work. If the argument of necessity were valid, it would prove too much. Confrontations occur in legislative committee hearings, union meetings, stockholders meetings, public parks, college campuses, and the streets. Violent, disorderly conduct in all these settings should be firmly and promptly punished. I am not convinced that the effective administration of justice will be enhanced by using *ex parte* procedures to deal with any of these situations, or by providing an unusual protective procedure available only to legislative assemblies.

If punishment is to serve as an effective deterrent to repeated or widespread disorder, it is important that the community at large have confidence in the fairness of the proceedings which lead to conviction and sentencing.

> "At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort in its enforcement to means which shock the common man's sense of decency and fair play." *Burdeau* v. *McDowell,* 256 U.S. 465, 477 (1921) (Brandeis J. dissenting).

In my opinion the preservation of order in our communities will be best ensured by adherence to established and respected procedures. Resort to procedural expediency may facilitate an occasional conviction, but it may also make martyrs of common criminals.

I respectfully dissent.

KILEY, *Circuit Judge,* dissenting.

I join in Judge Stevens' dissent for the reasons he gives.

I dissent for the further reason that the Assembly Resolution does not state facts sufficient to support its conclusion that Groppi was guilty of disorderly conduct punishable as contempt. The effect upon Groppi of this fatal deficiency was denial of fundamental fairness because he is not informed of what he did in the "immediate view" of the Assembly which amounted to disorderly conduct.

Groppi's habeas petition does not expressly cast the deficiency in the Resolution as a denial of due process as we have done. His petition alleges denial of his "right to be informed of the nature and cause of the accusation against him."[1] In this court Groppi argues persuasively the anomaly of a summary or direct contempt order reciting only a legal conclusion without a statement of the underlying facts supporting the conclusion. And he argues that "it is not clear" how a court can adequately review a contempt order unless the facts are stated.[2]

It is a fundamental rule that a judicial summary contempt order must carry, in itself, a statement of the acts or words constituting the contempt. This rule is implicit in *Ex parte Terry,* 128 U.S. 289, 305 (1888); and is stated in *Tauber* v. *Gordon,* 350 F.2d 843 (3rd Cir. 1965); *Parmelee Transportation Co.* v. *Keeshin,* 294 F.2d 310 (7th Cir. 1961); and *Hallinan* v. *United States,* 182 F.2d 880 (9th Cir. 1950). In *Great Lakes Screw Corp.* v. *NLRB,* 409 F.2d 375 (7th Cir. 1969), where an NLRB hearing examiner excluded defendant's counsel from the hearing for "contumacious conduct," this court held that the exclusion violated defendant's due process rights, saying "[n]o compelling reason exists for not extending the requirement of adequate disclosure of the basis for contemptuous conduct findings to the quasi-judiciary as well as the judiciary." *Id.* at 379. Respondent-appellant's brief

[1] Groppi made similar allegations in his petition for habeas corpus in the state proceedings.

[2] The Wisconsin Supreme Court took judicial notice of facts not in the record. These "facts" are contained in footnote 2 in the majority opinion here.

concedes that legislative exercise of its summary contempt power parallels judicial exercise of that power, and I see no reason why the legislature should not be similarly required to state facts constituting the contempt.

Here the contempt resolution states that "Groppi led a gathering of people . . . which by its presence on the floor of the Assembly during a meeting . . . prevented the Assembly from conducting public business and performing its constitutional duty" and that the "above-cited action" constituted "disorderly conduct in the immediate view" of the Assembly, an offense under Sec. 13.26(1) (b) Wis. Stat. and Art. IV. Sec. 8 of the Wisconsin Constitution. According to the Resolution, anyone—however innocently—who leads a "gathering of people" on the Assembly floor is ipso facto guilty of contempt. There is no statement, for example, of what activities Groppi or the "gathering" engaged in, how they obtained admission to the floor of the Assembly, or how the Assembly was prevented from performing its constitutional functions. All of this is left to the speculation of the reviewing court.

A complaint for disorderly conduct drawn in words similar to the Resolution before us would not support a conviction. *People* v. *Mulvey,* 135 N.Y.S. 2d 17, 206 Misc. 771 (1954); *People* v. *Lee,* 334 Ill. App. 158, 78 N.E.2d 822 (1948); *State* v. *Hettrick,* 126 N.C. 977, 35 S.E. 125 (1900). An indictment, where the subject law is general, must descend to particulars. *Russell* v. *United States,* 369 U.S. 749, 765 (1962); *United States* v. *Cruikshank,* 92 U.S. 542, 548 (1875). *See also United States* v. *Carll,* 105 U.S. 611, 612 (1882). *A fortiori,* where a person is punished by imprisonment without being informed of what he did that was unlawful, he is denied fundamental fairness. No meaningful review would be available to him. *See Great Lakes Screw Corp.* v. *NLRB,* 409 F.2d 375 (7th Cir. 1969).

Because Groppi has not been informed in the Assembly Resolution what acts or words of his constituted disorderly conduct so as to be contemptuous, I would

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In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1970 — SEPTEMBER SESSION, 1970

No. 18538

JAMES E. GROPPI,
Petitioner-Appellee,
v.
JACK LESLIE, Sheriff of Dane County,
Respondent-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

OCTOBER 28, 1970

Before HASTINGS, *Senior Circuit Judge,* CUMMINGS and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* On October 1, 1969, the Assembly, one of two houses of the Wisconsin state legislature, adopted the following resolution:

> "Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county jail.
>
> "In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

"Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted 'disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings' and is an offense punishable as a contempt under Section 13.26(1)(b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

"(1) Finds James E. Groppi guilty of contempt of the Assembly; and

"(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

"Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27(2) of the Wisconsin Statutes; and, be it further

"Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom."

Subsequent to the adoption of the Assembly resolution, a copy was served upon Groppi and he was imprisoned in the Dane County Jail upon the authority of said resolution. Prior to being served with a copy of the resolution, Groppi was given no specification of the charge against him, had no notice of any kind, nor was any hearing of any kind held. An application for a writ of habeas corpus was dismissed by the Circuit Court for Dane County and thereafter the Wisconsin Supreme Court also denied an application for a writ of habeas corpus and denied a motion for rehearing. *State ex rel. Groppi* v. *Leslie,* 44 Wis. 2d 282, 171 N.W. 2d 192 (1969).

On the same day that the Dane County Circuit Court denied Groppi's petition, a petition for a writ of habeas

corpus was filed in the United States District Court for the Western District of Wisconsin. Groppi was admitted to bail by the district court on the day the Wisconsin Supreme Court denied his petition but after he had served ten days of the sentence imposed by the Wisconsin Assembly. On April 8, 1970 the district court held that the legislature could not summarily impose jail sentence for contempt of the legislature without providing the accused with some minimal opportunity to appear and to respond to the charge. The court accordingly granted the writ of habeas corpus, dismissed the respondent Leslie's motion to dismiss, vacated the order releasing Groppi on bail and ordered that he be released from any further custody or restraint pursuant to the resolution of the Assembly. *Groppi* v. *Leslie*, 311 F. Supp. 772 (W.D. Wis. 1970).

Simultaneously a three-judge district court held constitutional that portion of the Wisconsin Statutes providing for further prosecution after the adjournment of the legislature, being §13.27(2), Wis. Stat. *Groppi* v. *Froehlich*, 311 F. Supp. 765 (W.D. Wis. 1970).

An exposition of the development of our law on the power of not only courts but legislatures to punish for contempt is to be found in both the decision of the Wisconsin Supreme Court and of the single-judge district court[1] and no worthwhile purpose will be served by burdening this opinion with a repetition thereof. Suffice it to say that the law as it presently exists is that the legislature as well as the court has the power to punish for contempt and further that where all of the essential elements of the misconduct are under the eye of the court and are actually observed by the court, the judge has the power to impose punishment summarily. The sole issue now before us on this appeal is as stated in the brief filed on behalf of Groppi: "Should the summary power of contempt to imprison a person without a notice or hearing be extended to a legislature."

The district court concluded "that such punishment may not be imposed by a legislature without at least

[1] *State ex rel. Groppi* v. *Leslie*, 44 Wis. 2d 282, 171 N.W. 2d 192 (1969); and *Groppi* v. *Leslie*, 311 F. Supp. 772 (W.D. Wis. 1970).

providing the accused with some minimal opportunity to appear and to respond to a charge." (311 F. Supp. at p. 777). We disagree.

Groppi contends that there is no historical precedent for the exercise of summary contempt power by the legislature. Insofar as reported court decisions are concerned the contention appears to be correct. Conversely, we have found no reported decisions holding that the legislature does not have summary contempt power. The fact of this apparent lack of authority either way suggests that instances of leading a gathering of people on to the floor of legislative halls and preventing the legislature from conducting public business are extremely rare if not virtually non-existent to this time in the United States.

Groppi further contends that our legislatures have apparently not needed summary contempt powers as they have functioned to date without that power. This assertion rather begs the question as it is not possible to tell whether they have functioned without the power if the need has not heretofore arisen for the use of the power. Whether the legislature does have the power is the issue before us. Whether legislatures in the future will have the need for summary contempt power may well be a *sequela* of the ultimate decision in the case before us.

We cannot be unmindful of recent relatively unprecedented illegal disruptions of the proceedings in courts in our country and this appeal, presenting, as it appears to do, a case of first impression, assumes in our judgment critically significant proportions as to the ability of deliberative legislative bodies to carry on their governmental functions.

While it might be difficult to equate with any degree of equanimity orderly governmental procedures with the effect of the conduct of Groppi as stated in the opinion of the Wisconsin Supreme Court,[2] and while the taking of

[2] "On September 29, 1969, during a regular meeting of the Assembly just prior to the commencement of a special session called by the governor, James E. Groppi led a crowd of noisy protesters into the state capitol building and proceeded to 'take over' the Assembly chamber to protest his disagreement with cuts in the state budget for certain welfare programs. The Assembly was unable to proceed with its legis-

the law into one's own hands, no matter how worthy the cause might be, is arguably an insecure basis from which to complain of swift and summary punishment, nevertheless, putting aside these considerations we determine the question here involved as a legal issue in a constitutional context. For the purposes of this appeal we are considering only the bare allegations of the Assembly resolution that Groppi led a gathering of people on the floor of the Assembly during a session thereof and prevented the Assembly from conducting a public business. It is on this factual basis we hold that the legislature may properly punish summarily for contempt.

It must also be borne in mind that we have here involved not mere words of incitation but rather deeds and acts of actual physical force.

The court below was of the opinion that the minimal requirements of procedural due process could be provided by the legislature with little delay, presumably referring to a legislative hearing. However, the invasion here involved is not of a committee or subcommitte of the legislature but of the legislative hall itself. Again, we cannot be unmindful of the protracted nature of court proceedings which involve a *cause célèbre*. The courts, notwithstanding occasional difficulties, are essentially designed to devote the necessary time. The legislature is not. Counsel for Groppi conceded during the argument on this appeal that conceivably a full legislative hearing could cause the work of the body to grind to a halt for several weeks. We find such a contemplation intolerable on the American scene.

We agree with that part of the decision of the district court (311 F. Supp. at 780) which disagreed with the

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[2] (Continued)
lative duties. We take judicial notice that Groppi publicly stated in the Assembly to his cheering supporters, in effect, that they had captured the capitol and intended to stay until they got what they wanted, and that Groppi vowed from the speaker's stand in the Assembly to remain there until the legislature restored funds for welfare recipients. The occupation of the Assembly by Groppi and the protesters lasted from approximately midday to well toward midnight." *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, , 171 N.W. 2d 192, 194 (1969).

declination of the Supreme Court of Wisconsin[3] to draw an analogy between courts and legislatures with respect to the power to punish direct contempt. If the only purpose of the summary contempt power was to remove from the legislative halls persons obstructing legislative activity, this no doubt could be ordinarily expeditiously accomplished by summoning the necessary police. The district court recognized that legislatures do impose sanctions for the purpose of punishing for a past deed, as well as for the purpose of preventing further interference with the legislative function. This is, in our opinion, as it should be. While we recognize that there is some disagreement as to the extent to which punishment is a crime deterrent, we are yet to be convinced that freedom from immediate and summary punishment would be any deterrent to proscribed activities.

In the opinion from which this appeal is taken, the district court adverted (at p. 777) to the possibility of a destruction of the parallel of the legislative situation to the court's summary powers because of the question whether "all of the essential elements of the misconduct" occurred "under the eye of" the members who voted affirmatively October 1 and were "actually observed by those members." In view of the fact that regularly constituted legislative sessions are frequently marked by substantially less than a full attendance on the "floor" by all members of the body, it may be arguable whether the strict standards enunciated in *In re Oliver*, 333 U.S. 257, 274-75 (1948),[4] need be scrupulously observed or whether it may not be adequate that proceedings were disrupted for those who were in the chamber at the time, that no further proceedings could be had during the continuance of the invasion and that the resolution of punishment be adopted by at least a majority of the body as a whole irrespective of whether each individual member there personally observed the misconduct. We do not

[3] 44 Wis. 2d at 296, 171 N.W. 2d at 198.

[4] "[F]or a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but * * * the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct."

need to determine this issue. The question of fact of whether the petitioner's acts on September 29 were observed by a specific member who voted affirmatively two days later was not timely presented to the state courts of Wisconsin and it would therefore appear that there had not been an exhaustion of remedies available in the courts of this state. 28 U.S.C. §2254. Further, there is no allegation which would serve to create an issue of fact included in the petition filed in the district court. The issue appears to have been created by the district court's opinion. We do not on this appeal deem it necessary to indulge in a presumption of non-regularity of the Assembly proceedings. *United States* v. *Chemical Foundation,* 272 U.S. 1, 14-15 (1926); *Barry* v. *United States ex rel. Cunningham,* 279 U.S. 597, 619 (1929).

The district court in its opinion, while expressing some skepticism (at p. 778) as to the viability, or at least desirability, of the doctrine of summary contempt power insofar as the courts are concerned, nevertheless, accepting the court situation as established law, found a basis for differentiating the factual situation presented on the one hand in the courtroom and on the other hand in the legislative chambers. Thus the court felt that the physical contours of most legislative chambers, the comings and goings of the members and the diffusion of attention of the members among other factors would render it improbable that all the members present would share a uniform perception and evaluation of the incident as would the single judge. The court's conclusion was that the room for error inherent in the response of a large group was so great as to require that it observe some minimal procedures before it invoked its contempt power. However, the matter is not before us on the factual basis of perceptivity of witnesses. It is before us on the basis that James E. Groppi led a gathering of people onto the floor of the Assembly and prevented the Assembly from conducting its business. The Wisconsin Supreme Court made it clear in its decision that factual matters such as erroneous perceptivity would be subject to review in the courts of that state. (171 N.W. 2d at p. 198). The court pointed out that Groppi had not sought a hearing in the Wisconsin Supreme Court or any court

on the merits of the contempt issue, and that he had not offered any defense nor denied that his acts amounted to a contempt, although the court had allowed him to amend his complaint to present any matter he wished.

As a matter of fact, there is a complete absence in the record before us in the proceedings in the federal district court and in this court on appeal of any denial by Groppi of the contemptuous acts with which he was charged. The sole contention of Groppi is simply that he should not have been summarily punished for the charged contemptuous acts.

To the extent that Groppi appears to be urging a jury trial pursuant to *Bloom* v. *Illinois*, 391 U.S. 194 (1968), we do not find *Bloom* applicable here as the punishment provided for in the resolution could not in any event have exceeded six months. *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966), *Dunkin* v. *Louisiana*, 391 U.S. 145, 162 n. 35 (1968).

Insofar as Groppi contends that the procedure whereby he was imprisoned constitutes a bill of attainder or a bill of pains and penalties, we agree with the district court on the invalidity of this contention and adopt and approve that portion of the district court's opinion.

The district court in its opinion also expresses the thought that unlike many courts of record, frequently, if not typically, no verbatim written record of legislative proceedings exists. Acts of violent disruption, such as those which have occurred recently in the state courts of California, would seem scarcely to lend themselves to a reporter's transcript any better than would the acts charged against Groppi in the resolution of the Wisconsin Assembly. In any event, a question of what happened factually and whether it is to be determined from a court reporter's transcript or from the mouths of eye witnesses is one which is not determinative of the issue before us. The proof of what happened in the legislative halls will be the same whether the legislature has to have a hearing prior to punishment or whether the hearing is in a court for a review of a claim of lack of factual basis for the punishment.

We share the laudable concern of the district court for the full protection of procedural rights guaranteed to the individual by the due process clause of the Fourteenth Amendment. In essence, however, we have in the case before us a situation in which we must balance claimed constitutional procedural rights of the individual citizen against the welfare of the citizenry as a whole. We find the scales weighted in favor of the citizenry. In so doing we do not feel we are adopting an alarmist view in recognizing validity in the respondent's position that protracted and frequent legislative trials, if necessary, could easily and realistically become a favorite tool in the politics of confrontation and obstruction, and representative government (whatever its present faults) would go down to defeat.

We reach with some reluctance any decision which appears even remotely to achieve an eroding effect on basic civil liberties as guaranteed by our constitution; but believing, as we do, that illegal and physically forcible interference with properly functioning governmental institutions would pose the real risk of being eventually accompanied by the abolition, rather than the erosion, of the individual constitutional liberties, we are unable to reach any other result in the case before us.

For the reasons hereinbefore indicated, the judgment of the district court is reversed, the petition for habeas corpus is hereby denied and respondent-appellant's motion to dismiss is hereby granted.

REVERSED.

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

OCTOBER TERM, 1970, FEBRUARY 17, 1971

Civil Action File No. 69-C-241 (H-C)

JAMES E. GROPPI,

Petitioner,

v.

JACK LESLIE, Sheriff of
Dane County,

Respondent.

JUDGMENT

This action came on for hearing before the Court, the Honorable JAMES E. DOYLE, United States District Judge, presiding, upon the Mandate of the United States District Court for the Seventh Judicial Circuit, entered on the 11th day of February, 1971, and filed herein on the 17th day of February, 1971; and the Court having entered its Direction to Enter Judgment herein pursuant to said Mandate:

IT IS ORDERED AND ADJUDGED: That the petitioner's petition for a writ of habeas corpus be and it hereby is denied; that respondent's motion to dismiss the petition be and it hereby is granted; that said petition for a

writ of habeas corpus be and it hereby is dismissed; and that costs be taxed in favor of respondent and against petitioner.

Dated at Madison, Wisconsin, this 17th day of February, 1971.

(s) JOHN R. ADAMS
Clerk of Court

A TRUE COPY, Certified this 17th day of February, 1971.

JOHN R. ADAMS, Clerk

By John R. Adams
Clerk

OPINION AND ORDER
(Caption Omitted)

This is a petition for habeas corpus in which it is alleged that petitioner is in custody in violation of the Constitution of the United States. 28 U.S.C. § 2241(c) (3). A response has been filed. Petitioner has been admitted to bail pending a decision on his petition.

Findings

Upon the basis of the entire record, I find:

On October 1, 1969, the Assembly, one of two houses of the Wisconsin state legislature, passed the following resolution (entitled "1969 Spec. Sess. Assembly Resolution"):

> Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county jail.
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> In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it
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> Resolved by the Assembly, That the Assembly finds that the above-cited action by James E.Groppi constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26 (1) (b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:
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> (1) Finds James E. Groppi guilty of contempt of the Assembly; and
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> (2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further
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> Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27 (2) of the Wisconsin Statutes; and, be it further
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> Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom.

A copy of the Assembly resolution was subsequently served upon petitioner and he was imprisoned in the Dane

County jail upon the authority of the said resolution. Prior to being served with a copy of the resolution and imprisoned, petitioner was afforded no specification of the charge against him, no notice of any kind, and no hearing of any kind. Thereafter, petitioner unsuccessfully sought to obtain his release by commencing various actions and proceedings in the state courts and in this court. The Circuit Court for Dane County dismissed petitioner's application for a writ of habeas corpus. The Wisconsin Supreme Court thereafter denied petitioner's application for a writ of habeas corpus, and denied a motion for rehearing. *State ex rel. Groppi v. Leslie,* 44 Wis. 2d 282 (1969).

Wisconsin Constitution and Statutes

Article IV, Section 8, Wisconsin Constitution, provides, in part:

"Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior . . . ."

Section 13.26, Wisconsin Statutes, provides, in part:

"(1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members . . . for . . . :

". . . .

"(b) Disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings . . . .

"(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature."

Section 13.27, Wisconsin Statutes, provides:

"(1) Whenever either house of the legislature orders the imprisonment of any person for contempt under s. 13.26 such person shall be committed to the Dane county

jail, and the jailer shall receive such person and detain him in close confinement for the term specified in the order of imprisonment, unless he is sooner discharged by the order of such house or by due course of law.

"(2) Any person who is adjudged guilty of any contempt of the legislature or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefor in Dane county, and may be fined not more than $200 or imprisoned not more than one year in the county jail."

Contentions of Parties

The petition for habeas corpus asserts that respondent sheriff's custody of petitioner pursuant to the Assembly resolution is unlawful because:

"petitioner has been denied the right to be represented by counsel, the right to a trial or hearing of any kind, the right to compulsory process for the attendance of witnesses, the right to be informed of the nature and cause of the accusation against him, the right to confront his accusers and the right to present his defense to the alleged charges."

The petition further asserts that the Assembly action constitutes "a bill of attainder and/or pains and punishments"; that the Assembly resolution is invalid because the Assembly was not legally in either regular or special session either on the date of the alleged offense or on the date the resolution was was passed; and that the remedies available to petitioner in the state courts are ineffective and inadequate to protect petitioner's rights.[1/]

[1/] Subsequent to the filing of the petition for habeas corpus in this proceeding in this court, the Supreme Court of Wisconsin denied a petition for habeas corpus. It is conceded that petitioner has now exhausted his state remedies with respect to those issues raised by his petition in the Wisconsin Supreme Court and those issues acted upon by that Court. 28 U.S.C. § 2254.

The respondent denies that petitioner's detention violates the Constitution of the United States, and moves to dismiss because the petition fails to state a claim upon which relief can be granted. No evidentiary hearing has been held. A hearing on issues of law has been held in this habeas corpus proceeding in conjunction with a hearing in a related three-judge case, *Groppi v. Froehlich*, 69-C-235.

Procedural due process

In *Ex parte Terry*, 128 U.S. 289, 313 (1888), this broad statement of the courts' contempt power appears:

> We have seen that it is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them.

This power in the courts has been reaffirmed frequently. *United States v. Barnett*, 376 U.S. 681, at 698 (1964); *In re Murchison*, 349 U.S. 133, 134 (1955); *Sacher v. United States*, 343 U.S. 1, at 8 (1952); *Fisher v. Pace*, 336 U.S. 155 (1949); *Cooke v. United States*, 267 U.S. 517, 534-535 (1925); *Ex parte Hudgings*, 249 U.S. 378, 383 (1919); *Ex parte Savin*, 131 U.S. 267, 277 (1889). See Rule 42 (a), Federal Rules of Crim. Proc.; 18 U.S.C. §§ 401, 402.

Commenting upon *Ex parte Terry* 60 years later, the Court emphasized that it had "recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the suppression and punishment of court-disrupting misconduct which alone justified its exercise." *In re Oliver*, 333 U.S. 257, 274 (1948). The Court continued (333 U.S. 274-276):

> That the holding in the *Terry* case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards, even in contempt cases, was spelled out with emphatic language in *Cooke v. United States*, 267 U.S. 517, a contempt case arising in a federal district court. There it was pointed out that for a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct. This Court said that knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense. Furthermore, the Court explained the *Terry* rule as reaching only such conduct as created "an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public" that, if "not instantly suppressed and punished, demoralization of the court's authority will follow." *Id.* at 536.
>
> Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way

of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public. If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the *Cooke* case, that the accused be accorded notice and a fair hearing as above set out.

In *Holt v. Virginia*, 381 U.S. 131 (1965), *Offutt v. United States*, 348 U.S. 11 (1954), and *Cooke v. United States*, 267 U.S. 517 (1925), the Court has demonstrated how narrowly circumscribed is the area in which summary power may be exercised by a court.[2/]

I turn to the subject of contempt of a legislative body. That agreeably to the Constitution of the United States a legislative house (hereinafter "legislature") may impose a jail sentence for contempt of the legislature is long established and has been reaffirmed in modern times. *Jurney v. MacCracken*, 294 U.S. 125 (1935).[3/] However, in *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 208 (1821), *Kilbourn v. Thompson*, 103 U.S. 168, 173 (1880), *Marshall v. Gordon*, 243 U.S. 521, 532 (1917), *McGrain v. Daugherty*, 273 U.S. 135, 153 (1927), and *Jurney v.*

[2/] Oklahoma has required, by its Constitution, Art. 2, § 25, that an opportunity to be heard must always precede imposition of a penalty or punishment for contempt. This requirement applies even to contemptuous conduct in the immediate view of the judge. *Sullivan v. State*, 419 P. 2d 559 (Okla. Ct. of Crim. App. 1966); *Young v. State*, 275 P. 2d 358 (Okla. Ct. of Crim. App. 1954).

[3/] I consider hereinafter this petitioner's contention that the Assembly resolution under which he is confined is a bill of attainder or a bill of pains and penalties.

MacCracken, supra, at 144, before being cited for contempt, the accused had been brought before the House or Senate to answer the charge or to purge himself. I am aware of no decision of the Supreme Court of the United States or of the Court of Appeals for this circuit in a case in which the contumacious behavior was said to have been disorderly conduct in the immediate view of the legislature and directly tending to interrupt its proceedings, nor any in which the legislature undertook to impose punishment summarily. I consider the question raised here to be an open question.

The petitioner has neither denied nor admitted in this court that he engaged in the conduct described in the Assembly resolution: namely, that he led a gathering of people which by its presence on the floor of the Assembly prevented the Assembly from conducting public business and performing its constitutional duty.[1/] The Supreme Court of Wisconsin has concluded, implicitly if not explicitly, that such conduct violates Sec. 13.26, Wis. Stat., which prohibits "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings"; this construction of the state statute is binding on

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[1/] Whether the Assembly was in regular session or special session on the date of the alleged offense or on the date the contempt resolution was passed is a matter of state law. In a habeas corpus proceeding here, petitioner may challenge the lawfulness of his custody only on the ground that it is "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241 (c) (3). *United States ex rel. Greer v. Pate*, 393 F. 2d 44 (7th cir. 1968), cert. den. 393 U.S. 890 (1968).

me.[5]/ I conclude that if such conduct had occurred in a courtroom in the presence of a judge, "where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court" (*In re Oliver*, 333 U.S. at 275), the judge would have been empowered to impose a jail sentence summarily. The precise question is whether such conduct in a legislative chamber may be punished summarily by a legislature by confinement in jail.[6]/ I conclude that such punishment may not be imposed by a legislature without at least providing the accused with some minimal opportunity to appear and to respond to a charge.

The Assembly resolution passed October 1 recites that petitioner engaged in certain acts September 29. The question arises whether "all of the essential elements of the misconduct" occurred "under the eye of" the members who voted affirmatively October 1, and were "actually observed" by those members. If not, the parallel to the court's summary powers is destroyed. It is a question of fact whether the petitioner's acts on September 29 were observed by a specific member who voted affirmatively two days later. How this issue of fact is to be resolved presents a problem. The text of the October 1 resolution is

[5]/ In its opinion, the Supreme Court of Wisconsin, apparently by an exercise of judicial notice, referred to numerous events and circumstances which were said to have occurred in and around the State Capitol September 29 and thereafter. No evidentiary hearing had been held by that Court, or at its direction, and none has been held in this court. So far as the events of September 29 in the Assembly chamber are concerned, the only version of the facts is that contained in the Assembly Resolution of October 1. Obviously, the incident and its aftermath were abundantly reported by the news media. It may appear precious for a court to refrain from accepting accounts of such an incident which are generally accepted by the public. For some purposes, it may be practical for a court to accept them. For example, it should not be necessary for a court to receive evidence that extensive rioting had occurred in a community prior to the particular events involved in a case. But the central issue in this case is whether, in circumstances such as these, a specific person who is said by the press, radio, or television to have engaged in certain specific acts may be imprisoned without those minimal procedures necessary to insure against mistaken impressions.

[6]/ Clearly, so far as the Constitution of the United States is concerned, the legislature, or members or officers or agents thereof, are free to remove from the house one engaging in such conduct and for a reasonable time to bar him from reentering. The issue here relates to imposing a term in jail.

silent on the point, and the record in this court sheds no light on it.[7]/ To impose the burden of proof upon the petitioner would be unreasonable; it would probably require him to take a discovery deposition of each member of the house (or at least of a number of those voting affirmatively October 1 which number would constitute a majority of those present and voting). When there is involved a power so extreme that its use by a court has been limited with intense care, the validity of its use by a legislature may not be made to depend upon a presumption of fact concerning whether the September 29 acts were observed by the October 1 voters.

However, even if the Assembly record itself or evidence presented in a court later, were to establish that there were present in the Assembly chamber September 29 a sufficient number of those members voting affirmatively October 1, I would conclude that the due process clause of the Fourteenth Amendment would forbid these members to impose a jail term upon the accused without first providing him with a reasonable opportunity to respond to a stated charge.

In my view, it is an anachronism that a judge should be permitted today to impose a jail term upon a contemnor without first providing him with a reasonable opportunity to respond to a stated charge. The doctrine with respect to courts is of ancient origin. Even in its present restricted and battered state, it is an unseemly aberration in a mosaic of procedural rights guaranteed by the due process clauses of Fifth and Fourteenth Amendments in many less compelling situations. But the doctrine does enjoy some slender roots in practical common experience. That is, when by the exercise of his own senses, the judge is a witness to the totality of the incident - the time at

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[7]/ Compare Rule 42 (a), Federal Rules of Criminal Procedure: "A criminal contempt may be punished summarily if a judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court."

which it occurred, the place at which it occurred, the immediate history of the situation in which it occurred - it is not wholly unreasonable to conclude that the room for error in his perception and evaluation of the incident is slight and that intermediate procedures may be dispensed with. Practical common experience affords no such support for a similar conclusion with respect to the room for error in perception and evaluation by a large group of human beings, whether judges, legislators, or others. The physical contours of most legislative chambers, the comings and goings of the members, and the diffusion of attention of the members, among many factors, render it improbable that all of the members present would share a uniform perception and evaluation of an incident, upon the basis of which each member might then decide upon an appropriate response. This would be true even at a moment when the legislature is actively in session, discussing the business before it, and more true at times at which it is commencing or terminating its work. The question is not whether these attributes of a legislature altogether prevent it from imposing a jail sentence upon a contemnor. The question is whether these attributes so distinguish a legislature from a court that the legislature must be prevented from visiting such punishment upon a contemnor with such swiftness and abruptness. I conclude that the room for error inherent in the response of a large group is so great as to require that it observe some minimal procedures before it invokes this power.[8/]

There are other reasons which lead me to this conclusion.

Unlike many courts of record, frequently if not typically no verbatim written record of legislative proceedings exists. If the availability of judicial review of the contempt citation is

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[8/] Perhaps similar considerations may affect the summary powers of courts consisting of more than one judge. However this may be, there remains a significant contrast between a court consisting of nine members, and the Wisconsin Assembly consisting of one hundred.

assumed, it would nevertheless be severely crippled by the absence of a definitive record of the incident.

Moreover, the nature of available judicial review is extremely unclear. In its opinion in the present case, the Supreme Court of Wisconsin stated (44 Wis. 2d at 297):

> We do not hold the action of the legislature is not reviewable in our courts and subject to correction. It is expressly provided in sec. 13.27, Stats., the contemnor may be discharged before his time by "the due course of law." The petitioner has not sought a hearing in this court or any court on the merits of the contempt issue. He has not offered any defense or denied his acts amounted to a contempt although this court in this proceeding allowed him to amend his complaint to present any matter he wished. The only issues presented dealt primarily with procedure, not with the issue of his innocence or with the merits of any defense. We think due process is satisfied when the courts are open to determine promptly any question concerning the merits of a contempt found to have been committed by summary process before a legislature for contempt committed in its presence.

And the court stated further (at 299):

> The only practical way a contempt in the presence of the legislature can be handled is by summary process reviewable by the judiciary. We think it is neither a necessary nor an acceptable construction of the constitution that a trial or a hearing be engrafted upon the legislative contempt power when the judiciary will immediately review the action of the legislature and has the power to grant adequate and appropriate relief.

Although this statement is somewhat surprising in the light of the limitations upon the historic function of the writ of habeas corpus,[9/] I am bound to accept it as an authoritative statement that one who has been imprisoned by the legislature for contempt of the legislature may obtain from a Wisconsin court a review of the "merits" of the legislative action. However, the nature and extent of this review is not explained. It is not clear whether the accused is entitled to a trial *de novo* on the underlying factual issues relating to his conduct, or whether the review is comparable to judicial review of an administrative decision, or whether the burden of persuasion rests with the accused petitioner or with the respondent. If there is indeed to be a review of the "merits", it appears that a trial of the facts would be necessary, since no trial has as yet occurred, and since there is no written record of the underlying events to which a court might look. Assuming, however, that these difficult matters could be resolved satisfactorily, the initial injustice would not be reached; the hearing, whatever it may be, would be afforded after the imposition of the punishment and not before.[10/]

I do not consider that affording petitioner some minimal opportunity to appear and to respond to a charge would constitute an undue burden on the legislature. The proceeding would

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[9/] In *In re Falvey and Kilbourn*, 7 Wis. *630 (1858), in a habeas corpus proceeding to test the lawfulness of a confinement imposed by the Assembly, the Court stated (at *639) that it had no appellate power over the Assembly when the Assembly had acted within its jurisdiction, and that the Court could not "suspend [the Assembly's] judgment because it has made a mistake or abused its discretion in the premises." In *State ex rel. Reynolds v. County Court*, 11 Wis. (2d) 560, 573 (1960), it was emphasized that in Wisconsin, even with respect to contempt of court, habeas corpus is "restricted to the question of the jurisdiction of the committing court" and that errors "in the exercise of jurisdiction" are not reviewable. See 39 Am. Jur. 2d, Habeas Corpus, § 28, pp. 198-201.

[10/] Bail was refused to this petitioner both by the Circuit Court for Dane County and the Supreme Court of Wisconsin. In an appeal from a conviction for contempt of court, sentence may be stayed and bail granted. *Sacher v. United States*, 343 U.S. 1, 12-13 (1952). On the other hand, bail is rarely granted in habeas corpus proceedings. *United States ex rel. Epton v. Nenna*, 281 F. Supp. 388 (S.D.N.Y. 1968).

probably resemble the contempt proceedings in the United States Congress discussed in *Kilbourn v. Thompson* and *Jurney v. MacCracken, supra,* in which the accused was ordered to appear before the bar of the House or Senate and to show cause why he should not be punished for contempt.[11/]

In its opinion denying habeas corpus to this petitioner, the Supreme Court of Wisconsin expressly declined to draw an analogy between courts and legislatures with respect to the power to punish direct contempt. 44 Wis. 2d at 295. The Court summarized the distinction between the two powers as follows (at 296):

> Under the judicial contempt power, a contemnor is imprisoned, not to prevent him from continuing to interfere with the judicial function of the court in the future but to punish him for having completed a contemptuous act in the presence of the court. This is punishment necessary to maintain the dignity, decorum, and respect for the court. This objective admittedly is also found in punishment for some crimes. In contrast, the legislative power of contempt, restricted as it is to prevent the contemnor from interfering with the functions of the legislature, is more in the nature of what is known as civil contempt. Its function is not to punish for a past deed but to prevent threatened conduct which interferes with the proper function of the legislative body.

Whatever the validity of this view in terms of the sources and early history of the contempt power, or in terms of justifications for its existence, I cannot agree that it accurately describes the uses of the power. On the one hand, courts impose

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[11/] The report of *In re Falvey and Kilbourn*, 7 Wis. *630 (1858), involving a contempt of the Wisconsin legislature, reveals (at *633-634) that the alleged contemnor was arrested on February 9, "arraigned before the said Assembly" on February 10, that the Assembly "thereupon" declared him to be in contempt, that he prayed to be heard by counsel in answer (which was refused), that he gave an answer in writing ("which the Assembly declared by resolution to be insufficient"), and that on February 11 the Assembly resolved that he was to be confined for ten days.

sanctions for contempt for the purpose of preventing further interference with their function, as well as for the purpose of punishing the offender for a completed act. For example, in *Fisher v. Pace,* 336 U.S. 155 (1949), the trial judge interrupted a lawyer who had persisted in making improper argument to the jury, and ordered him to be removed immediately from the courtroom and placed in jail. Indeed, in *Sacher v. United States,* 343 U.S. 1, 10 (1952), in discussing whether a court might summarily punish a lawyer during a trial or await the trial's end, the Court said that "[t]he overriding consideration is the integrity and efficiency of the trial process . . . ." On the other hand, legislatures impose sanctions for the purpose of punishing for a past deed, as well as for the purpose of preventing further interference with the legislative function. In *In re Falvey and Kilbourn,* 7 Wis. *630, 634 (1858), the Assembly sentenced the contemnor to jail for ten days "as punishment for the contempt . . . in failing to appear before the joint investigating committee." In *Jurney v. MacCracken,* 294 U.S. 125, 147-150 (1935), it was pointedly held that a legislature may impose punishment for contempt solely as punishment, after the legislative obstruction has been removed, or after the removal of the obstruction has become impossible. Moreover, in the present case, the resolution was adopted by the legislature two days after the acts complained of, and without a hearing even for the purpose of determining how long a period of confinement would be necessary to prevent the petitioner from causing further obstruction of the legislative function.

For the reasons stated, I conclude that the petitioner has been denied procedural rights guaranteed him by the due process clause of the Fourteenth Amendment, and that he is entitled to the relief he seeks.

Petitioner contends that the procedure whereby he was imprisoned constitutes a bill of attainder or a bill of pains and penalties. Art. I, § 10, clause 1, of the Constitution provides: "No State shall . . . pass any Bill of Attainder. . . ." A bill of attainder is a legislative act sentencing a person to death for an alleged crime without a judicial trial, while a bill of pains and penalties imposes some milder punishment. Both types are included in the constitutional prohibition on bills of attainder. Black's Law Dictionary 162 (4th ed. 1951).

In view of the conclusion I have reached, that petitioner is entitled to be released because he has been denied procedural due process, it is not strictly necessary to consider his contention with respect to attainder. However, if his contention in this respect were to be upheld, it might be that the legislature would be wholly deprived of power to impose punishment upon a contemnor, with or without due process. To make clear that I intend no such consequence, I add these comments.

There is some similarity between bills of attainder, which constitute punishment by a legislature without judicial safeguards, and legislative contempt judgments, which can also constitute punishment by a legislature without most judicial safeguards. However, the legislative contempt power has a long history, has been upheld numerous times during that history, *Jurney v. MacCracken*, *supra*, 294 U.S. at 148-150, and has never been limited or denied because it allegedly violates the constitutional prohibition against bills of attainder. The bill of attainder defense to legislative contempt citations "has not been seriously accepted by the Supreme Court, though Justices Black and Douglas have consistently raised the point in dissent." R. Goldfarb, *The Contempt Power* 223 (1963). See

Barenblatt v. United States, 360 U.S. 109, 153 *et seq.* (1959) (dissenting opinion).

I conclude that the prohibition on bills of attainder, on the one hand, and the legislative contempt power, on the other, have been permitted by the Supreme Court of the United States to co-exist for so many years that I am not free now to hold that the survival of the first demands the extinction of the second.

Right to a jury trial

The petition here does not assert specifically that custody is unlawful because petitioner was deprived of a jury trial. However, it does allege that he was denied the right to a trial or hearing of any kind; the right to a jury trial was asserted in oral argument; and the Supreme Court of Wisconsin expressly considered whether petitioner had been entitled to a jury trial and decided that he had not. 44 Wis. 2d at 298-299. I consider that petitioner has exhausted his state remedy with respect to the jury trial issue, and that he has sufficiently asserted it here. However, I express no opinion with respect to the merits of this contention.

I have concluded that in every case of contempt of the legislature, certain minimal requirements of procedural due process must be observed before the contemnor may be imprisoned. I do not consider these limitations upon the legislature oppressive. First, the minimal requirements of procedural due process can readily be provided with little delay. Second, the ability of the legislature to protect its proceedings from disruption lies primarily in its undoubted power to expel any disrupter immediately, and to employ appropriate police action to prevent further disruption.

ORDER

For the reasons stated above, and on the basis of the entire record herein, the petition for habeas corpus is hereby granted and respondent's motion to dismiss is hereby denied. The order of October 11, 1969, releasing petitioner on bail is vacated, and it is hereby ordered that petitioner be released from any further custody or restraint pursuant to the resolution adopted by the Assembly of the State of Wisconsin on October 1, 1969.

Entered this *8th* day of *April*, 1970.

By the Court:

/s/ James E. Doyle
District Judge

NOTICE OF APPEAL

(Caption Omitted)

Notice is hereby given that the respondent above named hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order granting a writ of habeas corpus to petitioner, which order was entered in this action on the 8th day of April, 1970.

ROBERT W. WARREN
Attorney General

DAVID J. HANSON
Assistant Attorney General

/s/ Sverre O. Tinglum
SVERRE O. TINGLUM
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OPINION OF WISCONSIN SUPREME COURT

44 Wis. 2d 282

STATE of Wisconsin ex rel. James E. GROPPI, Petitioner,

v.

Jack LESLIE, Sheriff of Dane County, Respondent.

No. State 122.

Supreme Court of Wisconsin.

Oct. 17, 1969.

Rehearing Denied Dec. 19, 1969.

Original action for writ of habeas corpus for release of protester imprisoned by resolution of the assembly for contempt committed in its presence. The Supreme Court held that where the protester did not deny the contempt or offer any defense, and the court were open to determine promptly any question on the merits of contempt found to have been committed by summary process before the legislature for contempt committed in its presence, due process was satisfied.

Petition denied.

1. Evidence

In proceeding upon application to state supreme court for writ of habeas corpus for lease of protester held in jail after being found in contempt by Assembly, Supreme

Court took judicial notice that demonstrator publicly stated in Assembly to cheering supporters that they had captured capitol and intended to stay until they got what they wanted, and that protester vowed from speaker's stand in Assembly to remain there until legislature restored funds for welfare recipients.

2. States

Constitution provision that each house may punish for contempt and disorderly conduct is not grant of contempt power but recognition and affirmation of historic and inherent contempt power possessed by legislative branch. W.S.A. Const. art. 4, § 8; W.S.A. 13.26, 13.27.

3. States

Statutes relating to punishment of contempt of either house of legislature were not grant of contempt power but regulation. W.S.A. Const. art. 4, § 8; W.S.A. 13.26, 13.27.

4. Constitutional Law

Where protester upon seeking release from imprisonment for contempt of legislature did not deny contempt or offer defense, and courts were open to determine promptly any question on merits of contempt found to have been committed by summary process before legislature for contempt committed in its presence, due process was satisfied. W.S.A. Const. art. 4, § 8; W.S.A. 13.26, 13.27.

5. Jury

Where term of imprisonment imposed by assembly for contempt committed in its presence was not longer than six months, protester was not entitled to jury trial. W.S.A. 13.26(1a) (b), 13.26, 13.27; W.S.A. Const. art. 4, § 8; Fed. Rules Crim. Proc. rule 42, 18 U.S.C.A.

6. Constitutional Law

Assembly resolution finding that action by protester was disorderly conduct and imprisoning him for contempt committed in its presence was not bill of attainder or bill of pains and penalties. W.S.A. 13.26(1) (b), 13.26, 13.27; W.S.A. Const. art. 4, § 8.

7. Constitutional Law

"Bill of attainder" and "bill of pains and penalties" are same in nature, a special act of legislature inflicting punishment upon person supposed to be guilty of severe offense without trial or conviction in ordinary course of judicial proceedings; penalty in "bill of attainder" is death and in "bill of pains and penalties" a milder degree of punishment less than death.

See publication Words and Phrases for other judicial constructions and definitions.

8. States

Governor was not without power to call special session while legislature was in general session. W.S.A. Const. art. 4, § 11.

The petitioner James E. Groppi was found in contempt by the Assembly of the Wisconsin Legislature on October 1st, 1969, and pursuant to the direction of the resolution of the Assembly was arrested by the respondent and held in the Dane county jail. His application for writ of habeas corpus was denied by the circuit court for Dane county and on October 7th, 1969, he applied to this court to take original jurisdiction to consider his petition for a writ of habeas corpus. While this application was pending, this court on October 8th and again on October 10th, 1969, denied the request of the petitioner to be temporarily released from custody on what he called bail. He was, however, released by the judge of the United States District Court for the Western District of Wisconsin on October 11th and enjoined from coming closer than a prescribed distance from the state capitol building in Madison, Wisconsin. His release does not render the question before us moot or affect our jurisdiction. This court waived oral arguments on the question of leave to take jurisdiction and accepted original jurisdiction on October 9th and heard oral arguments on the merits on October 10th, 1969.

James M. Shellow, William M. Coffey, Robert H. Friebert, Milwaukee, Percy L. Julian, Jr., Madison, for petitioner.

Robert W. Warren, Atty. Gen., Madison, for respondent.

PER CURIAM.

(1) On September 29, 1969, during a regular meeting of the Assembly just prior to the commencement of a special session called by the governor, James E. Groppi led a crowd of noisy protesters into the state capitol building and proceeded to "take over" the Assembly chamber to protest his disagreement with cuts in the state budget for certain welfare programs. The Assembly was unable to proceed with its legislative duties. We take judicial notice that Groppi publicly stated in the Assembly to his cheering supporters, in effect, that they had captured the capitol and intended to stay until they got what they wanted, and that Groppi vowed from the speaker's stand in the Assembly to remain there until the legislature restored funds for welfare recipients. The occupation of the Assembly by Groppi and the protesters lasted from approximately midday to well toward midnight. Thereafter the protesters were kept out of the state capitol building by police, sheriffs, and the national guard. The Assembly convened on October 1, 1969, and passed a resolution[1] find-

[1] "1969 Spec. Sess. ASSEMBLY RESOLUTION

"Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county jail.

"In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

"Resolved by the Assembly, That the Assembly finds that the above cited action by James E. Groppi constituted 'disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings' and is an offense punishable as a con-

ing the petitioner in contempt for "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings." The Asembly ordered his imprisonment for the duration of the 1969 regular session of the Wisconsin legislature, or for six months, whichever occurred earlier.

Counsel for the petitioner has made it clear he is not contending the Assembly is without authority to deal directly by way of summary contempt proceedings with acts committed in its immediate view and tending to disrupt its proceedings. What is argued in that the contempt proceedings no longer can be summary and the safeguards afforded defendants in criminal prosecutions by the United States Constitution must now be afforded in contempt proceedings involving contempts committed in the presence of the legislature. In such proceedings the petitioner claims he has a right to a hearing of some kind, to be represented by counsel, to compulsory process for the attendance of witnesses, to be informed of the nature and cause of the

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tempt under Section 13.26(1) (b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

"(1) Finds James E. Groppi guilty of contempt of the Assembly; and

"(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize person and deliver him to the jailer of the Dane county jail; and, be it further

"Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27(2) of the Wisconsin Statutes; and, be it further

"Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom. (End)"

accusations, to confront his accusers, and to proceed with a defense denying the accusation or giving an explanation for his conduct. This argument equates a finding of contempt and imprisonment by the legislature with a finding of guilt in a criminal trial and criminal punishment. Basically, the argument ignores the purpose and nature of the legislative proceeding and considers imprisonment by the legislative summary contempt process is for a crime and therefore the process must include the constitutional safeguards of criminal procedure in a court of law. A brief review of the origin, the basis, and the scope of the legislative power of summary procedure for contempt committed in its presence is necessary.

(2, 3) From the time of the adoption of our state constitution in 1848, it has been provided in sec. 8, Art. IV, that "each house may * * * punish for contempt and disorderly conduct * * *." In keeping with the recognized rules of construction of state constitutions, we consider this article not to be a grant of contempt power but a recognition and affirmation of the historic and inherent contempt power possessed by the legislative branch of our tripartite government and of the British Parliament. Historically, this contempt power has been considered one of self-defense and of self-preservation. Likewise, we do not consider secs. 13.26[2] and 13.27,[3] Stats., as granting any con-

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[2]"13.26 Contempt. (1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members; * * *

"(b) Disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings. * * *

"(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature."

[3]"13.27 Punishment for contempt. (1) Whenever either house of the legislature orders the imprisonment of any person for contempt un-

tempt power to the legislature but as regulation of that power. The forerunners of these sections were adopted in 1849 shortly after the adoption of the constitution. In the light of the law on contempts as it then existed and by their terms, these sections granted no power but limit and proscribe the exercise of the legislative contempt power. It was an expression of the legislative intent to limit its own power to less than that declared by the constitution and less than that exercised by the Parliament. The contempt power in sec. 13.26 was restricted to enumerated offenses and the imprisonment was limited to prevent the occurrence of such offenses during the session of the legislature. Punishment for the sake of punishment or "to teach a lesson" was not provided and was not the object of this confinment. Incarceration by the legislature was not an end in itself but a means to an end, *i.e.*, the freedom to perform its public duties which could only be obtained by imprisonment of the intruders. Assembly Rule 10, which Groppi and his followers were found to violate, provides who has floor privileges when the Assembly is in session. Needless to say, neither Groppi nor his followers qualified or had permission when they forcefully took over the Assembly. However, in sec. 13.27 it was provided as was customary at the time the constitution was adopted that the acts constituting a contempt were also to be a

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der s. 13.26 such person shall be committed to the Dane county jail, and the jailer shall receive such person and detain him in close confinement for the term specified in the order of imprisonment, unless he is sooner discharged by the order of such house or by due course of law.

"(2) Any person who is adjudged guilty of any contempt of the legislature or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefor in Dane county, and may be fined not more than $200 or imprisoned not more than one year in the county jail."

misdemeanor which after the adjournment of the legislature but not during the session could be prosecuted. A penalty of $200 or imprisonment of not more than one year in a county jail was provided.

We point out the resolution of the Assembly did not give James E. Groppi the maximum confinement since it confined him until the end of the session of the legislature but not exceeding a period of six months, whichever event occurred first. Thus if the session of the legislature lasted longer than six months James E. Groppi would still be released from confinement.

The history of the direct contempt power by parliament and the courts of England prior to the adoption of our federal constitution has been a subject of confusing scholarship and acceptance.[4] It is certain the House of Commons possessed authority to deal directly with contempts without the intervention of courts, including the power to impose prolonged terms of imprisonment. It has been suggested this power rested upon an assumed blending of the legislature and judicial authority possessed by Parliament when the House of Lords and the Commons were one and continued to operate after the division of the parliament into the two houses.

Nevertheless, prior to the adoption of our federal constitution some states recognized the necessity of the legislature to have the power of contempt even though one might consider it a judical power and granted or recognized the power in the legislature. This was done notably

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[4]See Holt, Privilege and Contempt; James, The Power of Congress to Punish Contempts and Breaches of Privilege; Fox, The History of Contempt of Court; Frankfurter & Landis, Power to Regulate Contempts, 37 Harvard L. Rev. 1010.

in Maryland and Massachusetts, whose state constitutions prior to 1787 recognized in the houses of the legislature the power to find persons guilty of contempt committed in their presence. Maryland Constitution of 1776, Article XII; Massachusetts Constitution of 1780, Article Second, chapter 1, section 3, Articles X and XI. In considering these state constitutions, the United States Supreme Court in *Marshall v. Gordon* (1917), 243 U. S. 521, 535, 37 S. Ct. 448, 451, 61 L. Ed. 881, stated the object "could only have been to recognize the right of the legislative power to deal with the particular acts without reference to their violation of the criminal law and their susceptibility of being punished under that law because of the necessity of such a legislative authority to prevent or punish the acts independently, because of the destruction of legislative power which would arise from such acts if such authority was not possessed." Almost contemporaneously with the adoption of the federal constitution similar provisions were written into other state constitutions. See Footnote 1, page 536, 37 S. Ct. 448, Marshall v. Gordon, *supra*.

In several United States Supreme Court cases, it has been held that while the inherent contempt power of the House of Commons could not exist in the Congress of the United States because of its delegated powers, nevertheless Congress did have limited implied powers of contempt ancillary and incidental to the legislative powers granted Congress. The first such case so holding was *Anderson v. Dunn* (1821), 6 Wheaton, 19 U. S. 204. This case squarely held that from the power to legislate there was to be implied the right of Congress to preserve itself, *i.e.*, to deal by way of contempt with direct obstructions to its legislative duties.

While in *Kilbourn v. Thompson* (1881), 103 U. S. 168, 26 L. Ed. 377, the court denied to Congress the judicial-legislative power of contempt possessed by the House of Commons, and reserved the question of the right of an implied authority for contempt in the legislature and incidental to the legislative power. But *in re Chapman* (1897), 166 U. S. 661, 17 S. Ct. 677, 41 L. Ed. 1154, the existence of an implied legislative authority to deal with direct contempts was upheld.

The court in *Anderson v. Dunn, supra,* was almost prophetic in describing what could happen if a legislative body did not have the power of contempt to protect itself. It said, p. 227, "The unreasonable murmurs of individuals against the restraints of society, have a direct tendency to produce that worst of all despotisms, which make every individual the tryrant over his neighbour's rights." And the United States Supreme Court goes on to state, "The total annihilation of the power of the house of representatives to guard itself from contempts * * * leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it." In considering the extent of the contempt power which a legislative body may assume upon the principle of self-preservation, the court stated its much quoted test, p. 230, "Analogy, and the nature of the case, furnish the answer—'the least possible power adequate to the end proposed;' which is the power of imprisonment." Since the contempt power was only to be used to protect the legislature in its deliberation, the duration of the confinement was to be limited to what was necessary and the court held, "that imprisonment must terminate with that adjournment."

Some 47 years later the Wisconsin legislature apparently mindful of this case used its first opportunity to so restrict its power of contempt in what is now sec. 13.26 to limit contempt to self-protection. Thus, Wisconsin, like many other American legislative bodies, did not pretend it possessed the unlimited power of imposing unlimited punishment which constituted the leading feature when contempt originated in the house of parliament in England but enacted sec. 13.27 exercising its legislative power to create a misdemeanor enforceable in a court of law. This restriction of the legislative power of contempt is a recognition of the "minimum of necessity" principle. Universally in the United States it is recognized this power of Congress and of a state legislature is a narrow one. *Jurney v. MacCracken* (1935), 294 U. S. 125, 147, 55 S. Ct. 375, 79 L. Ed. 802. Thus, it has been aptly said of this legislative power in distinguishing it from the judicial power of contempt that necessity initiated it, justified it, and fixes its limits. Dangel, Contempt, secs. 43 and 44; see 17 Am. Jur. 2d, Contempt—Legislative Bodies, sec. 119.

We make no reference by analogy to the judicial power of the courts to punish for direct contempt which is of a different scope and nature. True, the judicial power has been said by this court in *State ex rel. Ashbaugh v. Circuit Court* (1897), 97 Wis. 1, 8, 72 N. W. 193, 194, to be "necessarily inherent in such a court, and arises by implication from the very act of creating the court." We also recognized the judicial contempt power could be "regulated, and the manner of its exercise prescribed, by statute, but certainly it cannot be entirely taken away, nor can its efficiency be so impaired or abriged as to leave the court without power to compel the due respect and obedience

which is essential to preserve its character as a judicial tribunal." In characterizing the nature of the judicial contempt power, the court said, "It is, and must be, a power arbitrary in its nature, and summary in its execution. It is, perhaps, nearest akin to despotic power of any power existing under our form of government. Such being its nature, due regard for the liberty of citizens imperatively requires that its limits be carefully guarded, so that they be not overstepped. It is important that it exist in full vigor; it is equally important that it be not abused. The greater the power, the greater the care required in its exercise. Being a power which arises and is based upon necessity, it must be measured and limited by the necessity which calls it into existence."

In respect to the judicial power of contempt, there has raged for many years a storm over the summary procedure for contempts committed in the presence of the court. An explanation of the nature of the judicial power is important here to highlight what we think to be a distinction between the judicial power of contempt and the legislative power of contempt.

The history, the scope, and the extent of judicial power have been well explained in the leading cases of the United States Supreme Court.[5] Under the judicial contempt power, a contemnor is imprisoned, not to prevent him from continuing to interfere with the judicial function of the court in the future but to punish him for having completed a contemptuous act in the presence of the court. This is

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[5]*Green et al. v. United States* (1957), 356 U. S. 165, 78 S. Ct. 632, 2 L. Ed. 2d 672; *United States v. Barnett* (1963), 376 U. S. 681, 84 S. Ct. 984, 12 L. Ed. 2d 23; *Watkins v. United States* (1957), 354 U. S. 178, 77 S. Ct. 1173, 1 L. Ed. 2d 1273; *Gompers v. United States* (1914), 233 U. S. 604, 34 S. Ct. 693, 58 L. Ed. 1115.

punishment necessary to maintain the dignity, decorum, and respect for the court. This objective admittedly is also found in punishment for some crimes. In contrast, the legislative power of contempt, restricted as it is to prevent the contemnor from interfering with the functions of the legislature, is more in the nature of what is known as civil contempt. Its function is not to punish for a past deed but to prevent threatened conduct which interferes with the proper function of the legislative body. *Marshall v. Gordon, supra.*

While in our representative government the legislature does not and need not have the power of punishment, the Assembly and the Senate which are composed of persons chosen and elected by the people, who are answerable directly to the people, who are removable directly by the people through the elective process and who conduct public hearings to ascertain the will of the people, do need enough power to properly protect themselves and to properly discharge their constitutional responsibility.

The petitioner argues he has not been given a hearing or a trial in the legislature. This is true, but the question is whether he is entitled to a hearing. What is there to hear? It is not denied that his acts were contemptuous. It is not denied that he obstructed the legislature and made it impossible for the governor of Wisconsin to address the Assembly on the very subject matter which was of concern to the protesters. When the petitioner stood at the rostrum of the Assembly and protesters crowded the aisles and stood on the legislator's desks, when the speaker of the Assembly was unable to restore any semblance of order, what need is there for witnesses to tell the Assembly

as a body what it witnessed. These facts are not disputed by the petitioner in this proceeding.

(4) We do not hold the action of the legislature is not reviewable in our courts and subject to correction. It is expressly provided in sec. 13.27 the contemnor may be discharged before his time by "the due course of law." The petitioner has not sought a hearing in this court or any court on the merits of the contempt issue. He has not offered any defense or denied his acts amounted to a contempt although this court in this proceeding allowed him to amend his complaint to present any matter he wished. The only issues presented dealt primarily with procedure, not with the issue of his innocence or with the merits of any defense. We think due process is satisfied when the courts are open to determine promptly any question concerning the merits of a contempt found to have been committed by summary process before a legislature for contempt committed in its presence.

The value of the necessity of the summary contempt power of the legislature in direct contempts must be balanced with the rights of individuals who run afoul and interfere with the proper functioning of their government. We thing respect for lawful authority, the maintenance of order, the preservation and the right to exercise the legislative duties efficiently and without disruption and the recognition of other citizens' rights to have their elected representatives conduct their proceedings demand that the limited legislative power to deal with contempts committed in its presence by summary procedure should so remain and be promptly reviewable by the judiciary at the instance of the contemnor.

We are not overlooking *Bloom v. Illinois*, 391 U. S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522, wherein the Supreme Court after some years of staving off an insistent attack on the summary power of the courts in judicial contempt held in one sweep of the sword that in matters involving imprisonment of over six months in direct judicial contempts, the contemnor was entitled to a jury trial. The opinion was not written upon a clean slate, but it did erase *Green v. United States, supra,* and *United States v. Barnett, supra,* holding a jury trial was not required in judicial cases of direct contempt, and with them, some 50 other cases holding there was no distinction for a jury trial based on the seriousness of the offense. But this distinction of petty crimes for jury trial purposes was made in *Duncan v. Louisiana* (1968), 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491, and applied to the states. By *Bloom*, it was applied to judicial contempts and while special mention of contempts in the presence of the court was made, the court concluded that a criminal contempt was like other crimes, "in so far as the right to jury trial is concerned." Thus a judicial contempt carrying a punishment of six months or less need not be tried by a jury. Such contempts carrying more than six months imprisonment must be afforded a constitutional jury trial. This decision has engrafted the jury trial on Rule 42 of the Federal Rules of Criminal Procedure. We do not consider this case controlling legislative contempts because as pointed out in this opinion the confinement for legislative contempt is inherently not punishment and is different from either judicial contempt imprisonment or imprisonment for a crime.

(5) Assuming but not deciding the rule of *Bloom v. Illinois, supra,* does apply to legislative contempts, this petitioner would not be entitled to a jury trial or a hearing before the legislature because the maximum term of confinement provided by the resolution of the Assembly does not exceed six months. We do not consider the effect of *Bloom* if the petitioner is prosecuted in a court for a misdemeanor after the termination of the session of the legislature. If a jury trial were required, it would be impracticable if not impossible to hold it before the Assembly. Under no reasoning does *Bloom* require a hearing in the legislature. If the petitioner is not entitled to a trial or hearing before the legislature, there is little need for an attorney, for the compelling of witnesses, or an explanation of his conduct, for these rights are necessarily dependent upon a hearing. The petitioners have cited no cases holding summary proceeding for direct contempt of a legislature to be unconstitutional and we have not found any. The only practical way a contempt in the presence of the legislature can be handled is by summary process reviewable by the judiciary. We think it is neither a necessary nor an acceptable construction of the constitution that a trial or a hearing be engrafted upon the legislative contempt power when the judiciary will immediately review the action of the legislature and has the power to grant adequate and appropriate relief.

(6, 7) The petitioner argues the Assembly resolution is a bill of attainder prohibited by the United States Constitution. There is not merit in this contention. The petitioner was not found guilty of a crime by legislative act. Nor is the resolution of the legislature a bill of pains and penalties. Both of these bills are the same in nature—a

special act of the legislature inflicting punishment upon a person supposed to be guilty of a severe offense without a trial or a conviction in the ordinary course of judicial proceedings. The penalty in the bill of attainder is death and in the bill of pains and penalties a milder degree of punishment less than death. See Black's Law Dictionary, bill of attainder. 11 Am. Jur., Constitutional Law, sec. 347, p. 1175.

(8) The petitioner argues the resolution of the Assembly is invalid because the Assembly was not in a valid special session. He bases his argument on the premise the governor has no power to call a special session of the legislature before the legislature in a general session has adjourned *sine die*. Section 11, Article IV, of the Wisconsin Constitution, provides:

> "The legislature shall meet at the seat of government at such time as shall be provided by law ,* * * unless convened by the governor in special session, and when so convened no business shall be transacted except as shall be necessary to accomplish the special purpose for which it was convened."

The constitution does not limit the power of the governor to call special sessions only when the legislature is not in session. The purpose of a special session is to accomplish a special purpose for which it has convened. To deny the governor the power to call a special session while the legislature is in general session would in effect deny the governor the right to call the legislature into session to give priority consideration to those items he claims are of immediate statewide concern. This power of the governor

is a part of the checks and balances in our tripartite form of government.

We hold the Assembly exercised its contempt power validly in finding the petitioner in contempt and, therefore, the petition of James E. Groppi for a writ of habeas corpus is hereby denied.